

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,
Plaintiff,

vs.

U.S. DEPARTMENT OF HOMELAND
SECURITY,

Defendant.

Civil Action
No. 1:16-cv-00967-RDM

Washington, DC
January 5, 2017

2:06 p.m.

TRANSCRIPT OF STATUS CONFERENCE HEARING
BEFORE THE HONORABLE RANDOLPH D. MOSS
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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Proceedings recorded by realtime stenographic shorthand;
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P R O C E E D I N G S

1
2 **DEPUTY CLERK:** Civil action 16-967, Judicial
3 Watch, Incorporated versus U.S. Department of Homeland
4 Security. Will counsel please approach the podium and
5 identify yourselves for the record.

6 **MR. PETERSON:** Good afternoon, your Honor. James
7 Peterson for plaintiff Judicial Watch. With me at the table
8 is the president of Judicial Watch, Tom Fitton.

9 **THE COURT:** Good afternoon to both of you.

10 **MR. FITTON:** Good afternoon.

11 **MR. HEAPS:** Good afternoon, your Honor. Bailey
12 Heaps for the Department of Homeland Security. With me at
13 counsel table is Marcia Berman, like me from the Department
14 of Justice, and Grace Cheng from the Department of Homeland
15 Security.

16 **THE COURT:** Okay, thank you.

17 **MR. HEAPS:** Thanks.

18 **THE COURT:** So Mr. Peterson, why don't you kick
19 things off, it's your motion with respect to preservation.
20 I can say at the outset that I'm not sure that I see things
21 as changed fundamentally from the last time we discussed
22 this. We all knew there was going to be an election and
23 that it was likely that the individuals who are holding the
24 records were not going to be in government come a few weeks
25 from now one way or the other.

1 And so I guess the question really is what is
2 different? In particular -- and I'm not even sure I need to
3 know what's different so much as what is the particular need
4 in this case for the reason to believe that these records
5 won't otherwise be preserved and available to you?

6 **MR. PETERSON:** What's going to happen in two weeks
7 and a day or sometime shortly around that time, these
8 officials are going to leave.

9 **THE COURT:** I think some of them are already gone,
10 if not all of them. I mean, many of them are already gone I
11 think at least.

12 **MR. PETERSON:** Well, we haven't been informed of
13 that by the defendant. But in this case, what's going to
14 change is that they will no longer be agency employees.
15 While counsel for DHS has represented that they've currently
16 been asked to preserve, we don't know anything about that in
17 terms of what precisely they were asked to preserve, you
18 know, or any particular timing or criteria that were used to
19 try to. And what's going to happen is they're going to walk
20 out the door with these records, and that's going to change
21 the landscape.

22 **THE COURT:** I'm sorry, that's not really a correct
23 sort of analogy. It may be the records are already out the
24 door and they're going to be leaving their positions, but
25 they're not walking out the door with records that are

1 currently in the possession of the Department of Homeland
2 Security. The concern is that these individuals actually
3 have in their personal possession, and have for many months
4 and perhaps years had in their personal possession records
5 that may be records of the Department of Homeland Security.

6 So it's not as though on January 20th they're
7 leaving the building with a big box of documents that belong
8 to the Department of Homeland Security. Those documents or
9 records are already on their private servers at this point.

10 **MR. PETERSON:** But the critical difference is that
11 they will no longer be employees. And then they'll be in
12 the position where the Department of State was with Hillary
13 Clinton where all they're going to do is say we're going to
14 ask that these records be returned, but they'll have no
15 ability to compel.

16 **THE COURT:** But I guess my question is why is that
17 any different from when they're government employees versus
18 not government employees? Is the difference that the
19 President can fire the Secretary of Homeland Security over
20 this, and come the 20th he'll no longer have that remedy
21 available? I mean, that seems unlikely that that's the tool
22 that's going to be used to actually achieve the return of
23 documents.

24 **MR. PETERSON:** well, there are a variety of tools
25 certainly for an agency to compel an employee to do certain

1 things.

2 **THE COURT:** I guess that's my question, what is
3 the difference between an employee versus a former employee?

4 **MR. PETERSON:** well, the agency obviously has the
5 ability to instruct an employee to do certain things that it
6 cannot instruct a former employee to do.

7 **THE COURT:** And what is the basis for that?
8 That's what I'm trying to understand.

9 **MR. PETERSON:** The fact that they're -- part of
10 their employment relationship. I mean, I guess --

11 **THE COURT:** I mean, I would have thought that if
12 these are government records, whoever has them has to return
13 them to the government, they belong to the government. I
14 don't care whether you're a government employee or not a
15 government employee, if you have records that belong to the
16 government you have to return them. So I'm not quite sure I
17 see the difference as to whether you're a government
18 employee or not.

19 **MR. PETERSON:** I think stepping back here we
20 completely agree with that, your Honor. The simple fact is
21 that they should not be allowed -- that these records need
22 to be returned to the government. The agency has made no
23 representation whatsoever that they're going to be doing
24 that in regards to the three officials independent of this
25 FOIA case. They have a responsibility under the Federal

1 Records Act not to let these records leave or no longer --
2 they have to bring them back. They have to have control
3 over them wherever they may be. They have to have control,
4 and they haven't said anything about doing that. And once
5 they do do that, then it's going to make everything more
6 simple.

7 **THE COURT:** Okay. Well, let me hear from the
8 government then and ask questions about what they're doing
9 and what they've done.

10 **MR. PETERSON:** Thank you.

11 **MR. HEAPS:** Good afternoon, your Honor.

12 **THE COURT:** Good afternoon.

13 **MR. HEAPS:** I'd start by noting that a motion for
14 a preservation order is evaluated under the same high
15 standard as a motion for preliminary injunctive relief.

16 **THE COURT:** That's not necessarily correct. I
17 mean, I think there's a difference of views on that. Judge
18 Bates in the Al-anazi case said, "A document preservation
19 order is no more an injunction than an order requiring a
20 party to identify a witness or to produce documents in
21 discovery, and demands only that the party seeking a
22 preservation order demonstrate that it is necessary and not
23 unduly burdensome."

24 **MR. HEAPS:** I think even if that's the standard,
25 your Honor, Judicial Watch has fallen rather short of

1 meeting it. Nothing in their papers or particularly nothing
2 that we've heard today I would say justifies any sort of
3 preservation order. This was raised when we were here in
4 August, and Judicial Watch sort of spoke in broad terms
5 about bringing the records under the control of the
6 government. That wasn't ordered then. We told the Court
7 that we would memorialize the necessity that these officials
8 preserve which we have done.

9 **THE COURT:** So this case was filed in May.

10 **MR. HEAPS:** Correct, your Honor.

11 **THE COURT:** Where are the documents? I mean, I
12 wouldn't have thought it would be that hard to retrieve
13 e-mails from a handful of individuals who may have
14 government e-mails on their personal servers. It's now been
15 more than a half a year.

16 Where are the documents? Where are the records?

17 **MR. HEAPS:** That is the subject of our motion for
18 partial summary judgment. Our position is that we can't do
19 a search for those records given the boundless nature of
20 plaintiff's request asking for records that concern, regard
21 or relate to official government business. There's no way
22 to do a search for those records.

23 **THE COURT:** But haven't you requested -- I mean,
24 just as a matter of the agency's responsibility, said to
25 these individuals if you have -- I don't care whether

1 they're called for in this case or not, if you have records
2 that are government records you should return them?

3 **MR. HEAPS:** Well, as your Honor alluded to, I do
4 think that that is entirely independent of the case that
5 Judicial Watch has sought. And I think Judicial Watch
6 acknowledged that themselves just now.

7 **THE COURT:** But just as a matter of good
8 government, you know, whether someone brings a lawsuit or
9 not. There's a representative here at the table from the
10 Department of Homeland Security. We have a recent decision
11 from the D.C. Circuit that talks about the Federal Records
12 Act and the responsibility of an agency to retrieve records
13 that have left.

14 It's been six months, what's happened to the
15 records? Is anybody doing anything to actually retrieve
16 custody of those records?

17 **MR. HEAPS:** I think the question of whether
18 records have been removed or destroyed is sort of a
19 premature and hypothetical question. I think there's no
20 reason to doubt that the individuals intend to comply with
21 their obligations under the Federal Records Act, and that
22 the agency intends to comply with its obligations under the
23 Federal Records Act.

24 I think that the decision from the D.C. Circuit
25 that Judicial Watch brought forward shows that there are

1 mechanisms to bring back records as necessary.

2 **THE COURT:** But you say to me there's no reason to
3 doubt that the agency will pursue the records and that
4 they'll be returned, but it's been six months.

5 Is there any evidence that anything has been done
6 to retrieve those documents or records?

7 **MR. HEAPS:** I think that the six months though,
8 your Honor, refers to the time in a FOIA request which is
9 independent of any obligations under the Federal Records
10 Act. And I don't think we would be in this position with
11 respect to the FOIA case had a valid request been filed or
12 submitted.

13 **THE COURT:** But put that aside for a second. I
14 mean, the government has been on notice at least since May
15 though that there's reason to believe that there are e-mails
16 that are residing on individuals' private servers that are
17 government records, right?

18 **MR. HEAPS:** Your Honor, the first thing I would
19 point out -- and I think it's important because we're going
20 back and forth between FOIA and the Federal Records Act, is
21 we don't have reason to believe -- or let me be clear, we
22 don't know that there are federal records that are in the
23 personal e-mail accounts.

24 **THE COURT:** So has anyone checked to see if there
25 are? Has anyone asked a question, anything to try and

1 figure that out?

2 **MR. HEAPS:** I can't represent one way or the other
3 to that, your Honor.

4 **THE COURT:** Because you don't know at this point
5 or because you're not in a position to be able to tell me?

6 **MR. HEAPS:** I don't know if -- if your Honor's
7 question is has it been put in terms of the standard for the
8 Federal Records Act, I don't know.

9 **THE COURT:** Well, I guess my question just is that
10 it's been several months. Has anyone picked up the
11 telephone and called these individuals and said, you know,
12 there's this complaint that says that you have federal
13 records on your e-mail server, can you check and see?

14 **MR. HEAPS:** We've been in discussion -- the
15 Department of Homeland Security has been in discussions with
16 the individuals named in the request since very shortly
17 after the request came in about the existence of the FOIA
18 request. And then upon our discussion in August here in
19 court at the status conference, we memorialized a
20 preservation notice issued by the Department of Justice to
21 the Department of Homeland Security which was then sent
22 along to the individuals named in the request, and
23 hand-delivered to those individuals at which time they
24 confirmed an intent to abide by their obligation to
25 preserve. And now your Honor alluded --

1 **THE COURT:** What does that request cover? Does it
2 cover any communications relating to the official business
3 of the Department of Homeland Security?

4 **MR. HEAPS:** I want to be a little bit careful
5 about how I describe it, because as we've communicated to
6 Judicial Watch, we believe that's a privileged document.
7 But speaking in broad terms, yes, anything that could
8 arguably be responsive to Judicial Watch's FOIA request
9 which itself is very broad.

10 **THE COURT:** Is that an attorney-client
11 communication if it's with former employees? I mean, some
12 of these folks no longer work at the Department of Homeland
13 Security, correct?

14 **MR. HEAPS:** The preservation notice I'm referring
15 to was issued to three then current Department of Homeland
16 Security officials. Separately, the official who had left
17 when we were here in August, Christian Marrone, the former
18 chief of staff, was asked to search for -- sorry, preserve,
19 search for and return any records that could even arguably
20 be responsive to the FOIA request. So putting the former
21 employee aside, the --

22 **THE COURT:** I know that Mr. Mayorkas, I know that
23 he's no longer at the Department of Homeland Security
24 because he's at what was my former law firm currently.

25 **MR. HEAPS:** Yes, we are certainly aware that he

1 has left. And in fact, when he departed the Department of
2 Homeland Security, he was asked to reaffirm his intent to
3 abide by the preservation notice which he did. And the
4 other officials, Secretary Johnson and the general counsel
5 Mr. Bunnell, will be similarly reminded of their obligation
6 to preserve and asked to reaffirm their intent to do so when
7 they leave on or around January 20th.

8 **THE COURT:** If they've been instructed to do so,
9 what is the harm in the Court entering an order embodying
10 that?

11 **MR. HEAPS:** Well, the first harm is that whether
12 under the standard your Honor enunciated or the PI standard,
13 Judicial Watch hasn't met that standard. Beyond that,
14 looking at the proposed order that Judicial Watch has
15 submitted, it's not even clear what they're asking for in
16 this case. And so I think that sort of there's -- that both
17 underscores that it is not warranted and speaks to the harm.

18 I think that if -- as they suggested in August,
19 that they are requesting somehow some government employees
20 take possession, I think that is sort of a stunning remedy
21 and would have serious privacy implications.

22 **THE COURT:** Well, I certainly agree to the extent
23 that the request is one that all e-mails that reside on
24 their server for example be taken by the government, because
25 they presumably have personal e-mails as well as ones

1 relating to the government.

2 **MR. HEAPS:** Correct, it is almost entirely
3 personal e-mails. And I would just say one thing, your
4 Honor, just because there are a number of different cases
5 that get talked about a lot. These are not personal
6 servers, these are Gmail accounts.

7 **THE COURT:** Your clarification is well taken. I
8 didn't mean to slip into that language. So my recollection
9 is that the last time we spoke there was reason to believe
10 that there could have been as many as 17,000 e-mails that
11 one individual had, 5,000 for another, 500 for one and
12 11,000 for another --

13 **MR. HEAPS:** That's exactly right.

14 **THE COURT:** -- that dealt with official DHS
15 business, right?

16 **MR. HEAPS:** No, your Honor, those are total
17 e-mails period.

18 **THE COURT:** Oh, that they have in their Gmail
19 account?

20 **MR. HEAPS:** Correct. And so the argument that we
21 I think introduced when we gave you those numbers in August
22 and then that we flesh out in our summary judgment papers is
23 that it would be -- to search for in response to a FOIA
24 request or isolate for some other purpose any e-mails that
25 quote, unquote regard, concern or relate to official

1 government business would require perusing 17,000 e-mails
2 for Secretary Johnson, 5,000 for Deputy Secretary Mayorkas,
3 et cetera.

4 **THE COURT:** I guess what I don't understand is I
5 don't see how the government can argue that that process of
6 segregation is unduly burdensome based on Judicial Watch's
7 FOIA request given the fact that as I understand it, just as
8 a matter of the Federal Records Act, there's an obligation
9 to return to the government in any event any records that
10 are -- that relate to the official business of the
11 Department of Homeland Security.

12 So if there's an obligation under the Federal
13 Records Act to do that in any event, I'm not quite sure why
14 it is unduly burdensome to -- or why Judicial Watch's
15 request imposes an undue burden.

16 **MR. HEAPS:** But there are different standards
17 under the two acts. Something could be unduly burdensome
18 for the purposes of FOIA but potentially not for another
19 statute. And there is a difference as to what must be
20 returned to the government in terms of what is required,
21 what could be required under FOIA where you're talking about
22 agency records and the Federal Records Act which speaks in
23 terms of federal records and has a more substantive
24 component.

25 **THE COURT:** What would be the difference between a

1 FOIA record and a federal record?

2 **MR. HEAPS:** Well, a federal record -- speaking
3 sort of in broad terms, I believe the statutory definition
4 is that it documents sort of the function, purpose,
5 undertakings of the federal government which isn't
6 necessarily imported into FOIA's definition of what an
7 agency record might be.

8 **THE COURT:** So am I right in understanding that at
9 this point, nothing has taken place so far to try and
10 segregate out potential federal records from the personal
11 e-mails?

12 **MR. HEAPS:** From the personal e-mails, I can't --
13 I am not aware that any efforts have been undertaken. But
14 again, that is particularly true because of the request that
15 we received in this case. Had there been a request for -- a
16 bounded request that lended itself to search terms, I think
17 we'd be in a very different posture on all fronts.

18 **THE COURT:** Let me hear again from plaintiff's
19 counsel, thank you.

20 **MR. HEAPS:** Thank you, your Honor.

21 **THE COURT:** So why don't I put it as more of an
22 open-ended question. What are you requesting that the Court
23 do at this point?

24 **MR. PETERSON:** Sure. We would envision a range of
25 possibilities. Again, we don't know -- we didn't know when

1 we wrote our proposed order exactly what has been done.
2 Apparently not that much. So we would suggest that
3 immediately the agency either order the employees to print,
4 copy or otherwise provide to the agency the full range of
5 e-mails from within the two year period of the FOIA request.
6 That's not a burdensome thing to do. It might be
7 something -- for the Department of Homeland Security, it
8 might be something as simple as clicking a button on a mouse
9 to copy e-mails. Beyond that -- that could be saved or
10 printed.

11 Beyond that, at a minimum we would suggest that
12 the agency be required to provide a declaration as to the
13 specific steps taken to ensure the preservation; that the
14 employees be required under oath to state that they are
15 going to preserve until we finally begin this process of
16 recovering these records.

17 **THE COURT:** So with respect to your first proposal
18 with respect to printing, copying or otherwise producing the
19 e-mails within the two year range, you're only talking there
20 about the e-mails that relate to government business I
21 assume and not their personal e-mails?

22 **MR. PETERSON:** well, the agency asserts that it's
23 too difficult for them to segregate. We would suggest that
24 well, okay, for the time being then copy -- electronically
25 copy the full range so that we can then --

1 **THE COURT:** And provide it to the government?

2 **MR. PETERSON:** I'm sorry?

3 **THE COURT:** And provide that to the government?

4 **MR. PETERSON:** It wasn't --

5 **THE COURT:** I would think that that would violate
6 the rights of the individuals. I suspect there are various
7 statutes that would protect them with respect to that.

8 **MR. PETERSON:** It could be kept -- at most, it
9 could be kept under seal. It could be deposited with the
10 Court under Rule 67. I mean, there are any number of
11 possibilities here. It was these employees that chose to
12 intermingle agency records within their personal matters.
13 As the former Secretary of State well knows, unfortunately
14 that results in possibly some impingement on privacy. But
15 that's the situation that they created, the agency and these
16 employees.

17 You know, the startling thing here is, as agency
18 counsel has admitted, no efforts have been made to recover
19 these e-mails after all this time. And we're going to be in
20 a situation where federal records are -- these employees
21 will have all left and the federal records will be out there
22 with no attempts to recover, and we'll be dealing with this
23 in a Federal Records Act case soon enough.

24 **THE COURT:** Well, as I indicated before, I'm not
25 sure I buy that portion of your argument just because I

1 think the records are out there already. They're not
2 walking out the door and you're asking me saying please
3 don't let them walk out the door in this. They're sitting
4 on --

5 **MR. PETERSON:** But we don't know that.

6 **THE COURT:** -- a Gmail server somewhere.

7 **MR. PETERSON:** well, okay, excuse me. Yes. But
8 we don't know that, your Honor. We don't know that the
9 employees agreed not to delete whatever they consider a
10 potentially responsive record.

11 **THE COURT:** I think it's been represented to me
12 that they have, but we can clarify that and we should
13 clarify it.

14 **MR. PETERSON:** But we don't know that the
15 employees may feel bound by that after they've left
16 employment. They may think their FOIA responsibilities end
17 for all we know.

18 **THE COURT:** So let me ask you this. I understand
19 the -- sort of understand the concern about the
20 attorney-client communication. What is it that you would
21 have the department communicate to these four individuals?
22 You know, preserve all the e-mails in your accounts
23 before -- that are existing until such time as somebody can
24 make a determination with respect to what's a federal record
25 and what's not a federal record; two, we want your

1 affirmation that you understand that you're going to agree
2 to abide by that condition. Anything more than that?

3 **MR. PETERSON:** well, if this is couched in terms
4 of a court order and they're required and they are stating
5 under oath that they're going to do that, I mean, that's
6 helpful. We don't think it's as good as having the --
7 preserving the records so that they can be then evaluated by
8 agency employees when the times come. I mean, this is a
9 really remarkable situation when federal records are out
10 there, no attempts have been made to recover them and
11 apparently none have even been planned.

12 **THE COURT:** Let me talk again to Mr. Heaps.

13 My question for you is can you represent today or
14 if not today in the future that all four of the individuals
15 here have been told that they're required as a matter of
16 federal law to preserve any federal records; that that means
17 that they should preserve all the e-mails that they have
18 pending some determination with respect to what a federal
19 record is or not; and three, that they've affirmed that they
20 will in fact do what's been asked of them?

21 **MR. HEAPS:** Your Honor, because perhaps today or
22 yesterday with the notice of supplemental authority is the
23 first time Judicial watch has ever mentioned the Federal
24 Records Act in this case and certainly hasn't pleaded such a
25 claim, I can't put it in terms of what the Federal Records

1 Act requires. What I can tell your Honor is that the
2 individuals have been notified that they're obligated to
3 preserve records that could even arguably be responsive to
4 Judicial Watch's FOIA request; that that obligation to
5 preserve is not time bound; and that that obligation to
6 preserve continues until they're told otherwise.

7 **THE COURT:** And have all four of them agreed
8 expressly to do that?

9 **MR. HEAPS:** The three who worked at DHS when we
10 came before the Court in August have confirmed their intent
11 to abide by the preservation notice. The fourth,
12 Mr. Marrone, had already departed the Department of Homeland
13 Security, and he was asked to preserve, search for and
14 return any even arguably responsive records. And I can't
15 speak to -- I know he's in receipt of that notice. I can't
16 speak to whether he's confirmed an intent to abide by it.

17 But I do think it's important to reiterate, your
18 Honor, that that is what the D.C. Circuit told us to do in
19 its CEI decision. The panel there said what you have to do
20 is you have to ask that records be returned, and that is the
21 requirement that DHS has abided by.

22 **THE COURT:** What guidance have you provided with
23 respect to what records may even arguably be related to the
24 FOIA request in this case? I mean, how are they to
25 understand that? What are they going to understand that to

1 mean?

2 **MR. HEAPS:** Well, again I want to be careful not
3 to reveal the nature of specific attorney-client
4 communications, but --

5 **THE COURT:** If there's a need for you to do so in
6 an ex parte manner, I can ask Mr. Peterson whether that's
7 something that he would be amenable to.

8 **MR. HEAPS:** And we can provide the preservation
9 notice that issued to your Honor in camera ex parte.

10 **THE COURT:** Mr. Peterson, any objection to them
11 doing that?

12 **MR. PETERSON:** No, we don't have an objection to
13 them doing that.

14 **THE COURT:** Okay, thank you. I would request that
15 you do that.

16 **MR. HEAPS:** Okay.

17 **THE COURT:** I would request you do that, and I
18 would request that you confirm one way or the other with the
19 one official who has actually departed whether he agrees to
20 abide by the request to produce -- to maintain or preserve
21 and to return the records just so we know whether he's
22 agreed to that or not.

23 **MR. HEAPS:** That, your Honor, is something I can
24 certainly work with the agency to undertake.

25 **THE COURT:** It's just a matter of picking up the

1 phone and calling him. If the answer is he won't take our
2 phone calls or that he won't answer the question, you can
3 tell me that.

4 **MR. HEAPS:** Okay, I can do that, understood.

5 **THE COURT:** So why don't we do that for now. I'm
6 going to direct that the government produce in camera under
7 seal the preservation notices that it sent to all four of
8 the individuals. And I'd like also some representation from
9 the government on the record with respect to which of those
10 individuals have agreed expressly to be bound by that
11 direction or request -- or to comply with it.

12 **MR. HEAPS:** And I'm sorry, just to clarify,
13 something beyond what I have been able to represent to the
14 Court today?

15 **THE COURT:** Well, I think that probably -- I mean,
16 you're going to need to get back to me with respect to the
17 one individual that left anyway. I think it probably would
18 just be helpful to file something just so we have something
19 on the record. I'm not doubting your word at all for it,
20 but to have something on the record that says the Court --
21 you can say that you're filing a notice of in camera filing
22 saying you filed the preservation notices in camera with the
23 Court; and this is further to say this is to represent the
24 following individuals have agreed to abide by that notice or
25 if it's not -- they haven't agreed, to explain what the

1 circumstances are with respect to that. And then I can have
2 that and just sort of figure out where to go from there.

3 Now, I know I've got a motion pending in front of
4 me now which I think is now fully briefed; is that right?

5 **MR. HEAPS:** Yes, your Honor.

6 **THE COURT:** But I do think that -- I mean, I'll
7 turn to that as soon as I can, but I've got quite a few
8 things of ahead of it in the queue. But I do think that we
9 probably ought to schedule a status conference. I'd like to
10 sort of know at the next status conference what has been
11 done. And it may be that the government just needs to
12 evaluate what it needs to do in light of the recent Judicial
13 Watch decision from the D.C. Circuit. But whether there
14 have been any efforts made to actually obtain the return of
15 any government records to the department that those
16 individuals may have.

17 I mean, I don't want to get too much into the
18 merits, but sort of just based on my recollection of the
19 Federal Records Act and FOIA, I think that if somebody just
20 CCs for example their personal Gmail account on a record
21 that is also copied to their official e-mail, I don't know
22 that that raises an issue under the Federal Records Act.
23 Because all Federal Records Act and FOIA would require is
24 that there actually be preserved a record of the
25 communication in the department.

1 **MR. HEAPS:** The Federal Records Act I believe
2 expressly allows for such communications sent on a private
3 address but copied -- or copied or forwarded to a .gov.

4 **THE COURT:** Right. So it would only be a
5 circumstance where the only copy of the communication was
6 beyond the control of the government and the ability of the
7 government to respond. And I think getting some sense --
8 assuming that the government -- and after looking at the
9 recent decision, concludes that there is some need to do
10 something more on this, getting some sense of what the
11 government is doing with respect to any Federal Records Act
12 issue I think may ultimately also play into resolution of
13 the FOIA request.

14 I mean, if the government has determined for
15 example that it needs to retrieve the documents in any event
16 in light of the recent decision from the D.C. Circuit, it
17 may be that there's not much of a burden at that point in
18 time in saying well, you know, we want a copy of the
19 records. We'll have to obviously review them for FOIA
20 exceptions, but we have a discrete set of records to review
21 at this point in time.

22 **MR. HEAPS:** I think that that would certainly
23 change things in some respects with respect to the burden
24 argument. But we've cited a long line of cases that stand
25 for the proposition that a request that asks for records

1 that concern, regard or relate to something, particularly
2 U.S. government business, is -- that such requests are
3 invalid on their face. And that's true no matter how many
4 records need to be searched if you were actually going to do
5 a search. And I think that there's a long line of those
6 cases cited in our brief. I think that Judge Chutkan's
7 recent opinion that we cite and rely on heavily, Landmark
8 Legal, makes that point rather nicely.

9 **THE COURT:** I'm obviously not going to prejudge
10 the motion. As I said, I haven't dug into it yet. You may
11 well be right about that, I just haven't looked at it yet.

12 **MR. HEAPS:** Sure.

13 **THE COURT:** And I'm not asking that you concede
14 anything in the motion at this point, but just that if you
15 conclude that for other reasons it's necessary to retrieve
16 these documents, that may just be something worth knowing as
17 the Court addresses the issue.

18 what would be a reasonable period of time to set
19 for a further status conference that would allow you sort of
20 internally to explore what the government's position is with
21 respect to whether it may need to do more to retrieve the
22 documents, and then to sort of get a sense of what would be
23 involved in doing that and what the scope of any retrieval
24 would be?

25 **MR. HEAPS:** Can I speak to my colleagues very

1 quickly?

2 **THE COURT:** Of course.

3 **MR. HEAPS:** Thank you.

4 (Brief pause.)

5 **MR. HEAPS:** I think, your Honor, that 30 days
6 would be what we would request.

7 **THE COURT:** So why don't we then set a status
8 conference. Why don't we do it at 2:00 o'clock on the 2nd,
9 does that work for everybody for a further status
10 conference -- 2nd of February?

11 **MR. HEAPS:** Your Honor, I hate to be the difficult
12 party here, but I'm scheduled to be in California planning
13 my wedding on that date. I've paid for flights, and worst
14 of all, I've told my fiance's parents that I'll be there.

15 **THE COURT:** I will not interfere with that. So
16 how about the 17th at 2:00 p.m., does that work for you?

17 **MR. HEAPS:** That should work, your Honor.

18 **THE COURT:** Mr. Peterson?

19 **MR. PETERSON:** Certainly.

20 **THE COURT:** Okay. So let's have a further status
21 conference on February 17th at 2:00 p.m. In the meantime,
22 the government is going to make an ex parte in camera
23 submission to me of the preservation orders -- or the
24 preservation requests, and will file on the record a notice
25 of that filing along with an indication of what you've heard

1 back from each of the four individuals with respect to their
2 intentions with respect to abiding by that request.

3 **MR. HEAPS:** Yes, your Honor.

4 **THE COURT:** Okay. Mr. Peterson?

5 **MR. PETERSON:** If I may. We don't have any
6 objection to materials being provided in camera. But just
7 for sake of clarification, we do not -- we do object to this
8 kind of schedule. It essentially obviates any need for
9 this, because they will no longer be agency employees
10 presumably by that point and we'll be in the position of
11 where they're making simple requests like they have to the
12 fourth employee here. We will have missed the opportunity
13 to keep the records from leaving government control in any
14 respect.

15 **THE COURT:** Okay, understood. Actually, that does
16 remind me I don't think we discussed when the government
17 will make the filing, the in camera filing.

18 So when would you propose to do that -- which is
19 what will put me in a position in which I can make a
20 decision on the pending motion then?

21 **MR. HEAPS:** A week, your Honor.

22 **THE COURT:** That's fine. So today is January 5th,
23 so by the 12th of January you'll make that filing which will
24 give me a week -- a little over a week before any
25 transition. As I've indicated, I mean, two of the

1 individuals are no longer in the government in any event. I
2 guess I'm not convinced that whether they're in the
3 government or not makes an ultimate difference if they have
4 an obligation. If they're government records, they belong
5 to the government and they have an obligation to return them
6 if that's the case.

7 And if need be, at some point in time the Court
8 could enter an order I think that would even run against the
9 individuals if they refused to return the records. We'd
10 obviously have to take that up at the time. But I don't
11 think the fact that the folks are leaving government
12 fundamentally changes things. If it does, you're out of
13 luck then already as to two of the four.

14 **MR. PETERSON:** Okay. Thank you, your Honor.

15 **MR. HEAPS:** Thank you.

16 **THE COURT:** Okay. Anything further today?

17 **MR. HEAPS:** No, thank you.

18 **MR. PETERSON:** No, thank you.

19 **THE COURT:** Okay, thank you.

20 (Proceedings adjourned at 2:45 p.m.)

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C E R T I F I C A T E

I, Jeff M. Hook, CSR, RPR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

January 6, 2017

DATE



Jeff M. Hook, CSR, RPR

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