

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY,

Defendant.

Civil Action No. 16-967 (RDM)

PRESERVATION ORDER

Plaintiff Judicial Watch, Inc. (“Judicial Watch”) brings this case against the Department of Homeland Security under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Judicial Watch alleges that four current or former Department officials used private email accounts to conduct official agency business. Dkt. 1 at 2–3 (Compl. ¶¶ 5–6).¹ It seeks to compel the production of “[a]ny and all emails regarding, concerning, or relating to official United States Government business sent to or from [each of the four individuals] from December 23, 2013 through [December 29, 2015] in which [the individuals] used non-‘.gov’ email addresses.” *Id.*

Before the Court is Judicial Watch’s Motion for a Preservation Order. Dkt. 18. Concerned about the upcoming change in administration, Judicial Watch seeks “[a]n order requiring [the Department] to take steps to preserve the agency records at issue.” *Id.* at 2. The Department responds that no such order is necessary because the Department has issued written Preservation Notices to each of the four individuals in question. Dkt. 19 at 3–4. In support of

¹ The four individuals are Secretary Jeh Johnson, Deputy Secretary Alejandro Mayorkas, former Chief of Staff Christian Marrone, and former General Counsel Stevan Bunnell. *Id.*

that contention, the Department has provided the Court with copies of those Preservation Notices for *in camera* review, and it has represented on the record that the individuals have “confirmed in writing their intent to abide by the Preservation Notice that they received.” Dkt. 21. Judicial Watch responds by requesting that the Court (1) publish the Preservation Notices to the docket to the extent they are not covered by attorney-client privileged, (2) order the Department to produce the written confirmations, and (3) take notice of Judge Kessler’s preservation order in *Competitive Enterprise Institute v. Office of Science & Technology Policy*, No. 14-cv-765-GK (D.D.C. Dec. 12, 2016), ECF. No. 31. *See* Dkt. 22.

Upon review of the Preservation Notices that the Department sent to each of the individuals, the Court concludes that the Department has taken appropriate steps to preserve the emails at issue. And, given the Department’s representation, the Court has no reason to doubt that the four individuals have agreed to comply fully with their obligations to preserve any potentially responsive emails and that they have every intention of doing so.

Nonetheless, out of the abundance of caution, the Court will order an additional preservation step to minimize the risk of any inadvertent loss of potentially responsive emails. Specifically, the Court will order the individuals to copy any emails from the relevant time period in any private email accounts that might contain responsive materials onto portable thumb drives, to be kept in the individuals’ personal possessions. This is the solution that the Government proposed and that Judge Kessler adopted in *Competitive Enterprise Institute*. The Court is persuaded that copying the emails to a physical drive will minimize the risk that any responsive email might be inadvertently deleted. And the Court is likewise persuaded that this solution poses no risk to the individuals’ privacy. As in *Competitive Enterprise Institute*, the “emails will remain in [each individual’s] possession and will not be searched [without consent]

until the Court makes a determination on the merits” of Judicial Watch’s FOIA claim. *Id.* at 9. Although the risk of inadvertent loss of any potentially responsive emails is low, the burden of copying all emails sent or received during the designated time period to thumb drives is equally low.

Finally, with respect to Judicial Watch’s additional requests, Dkt. 22, the Court declines to order the Department to produce the individuals’ written confirmations of their intent to preserve the emails. At least some of those communications are likely privileged, and both Judicial Watch and the Court can rely on the Department’s representation that the written confirmations exist. The Court has taken under advisement Judicial Watch’s request that the Court publish the Preservation Notices to the docket, and defers ruling on that request for the present time.

Accordingly, it is hereby

ORDERED that Secretary Johnson preserve all emails sent or received between December 23, 2013, and December 29, 2015, that are stored in any of his private email accounts that may contain responsive records, including any emails in archived or deleted folders, on a portable thumb drive or hard drive to be kept in his possession until this Court determines that the emails must be provided to the Department for processing or that they may be deleted;

FURTHER ORDERED that Deputy Secretary Mayorkas, former Chief of Staff Marrone, and former General Counsel Bunnell do the same with respect to their own private email accounts that may contain responsive records;

FURTHER ORDERED that the Government is not to conduct any searches of the email accounts at issue at this time without the consent of the account’s user; and

FURTHER ORDERED that Judicial Watch's request that the Court order the Department to produce each individual's written confirmation of his intent to preserve records is **DENIED**.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: January 18, 2017