

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

JUDICIAL WATCH, INC., *et al.*,
Plaintiffs

v.

UNITED STATES DEPARTMENT OF
JUSTICE,
Defendant

Civil Action No. 18-967 (CKK)

ORDER

(August 6, 2018)

This is a Freedom of Information Act (“FOIA”) action. It arises from two FOIA requests that Plaintiffs have submitted to the United States Department of Justice for records related to the former FBI Director, James Comey. Specifically, Plaintiff Judicial Watch Inc.’s FOIA request seeks memoranda by Director Comey, if any exist, summarizing conversations with former President Barack Obama, former Vice President Joe Biden, former Secretary of State Hillary Clinton, Senator Chuck Schumer, Representative Nancy Pelosi, or Senator John McCain, and any handwritten notes used to prepare such memoranda. Plaintiff Daily Caller News Foundation (“DCNF”) submitted a request for records that identify and describe any meetings between former Director Comey and President Obama. Currently pending before the Court is the parties’ [13] Joint Status Report (“JSR”) and Plaintiffs’ [14] Motion for a Preservation Order (“Pls.’ Mot.”).

In the parties’ Joint Status Report, Defendant represents that it has completed its search for responsive records and is in the process of reviewing the records located to determine whether they are in fact responsive and, if so, whether they are protected from disclosure under any FOIA exemptions. JSR at 2. After an initial responsiveness review, the total number of pages remaining to be reviewed is 321. *Id.* Due to increases in its FOIA workload, Defendant does not expect this review to be completed, and any non-exempt responsive records to be released, until September 28, 2018. *Id.* Defendant requests that the parties be ordered to file another Joint Status Report two weeks after that date. *Id.* Plaintiffs contend that this schedule is unreasonable, and request that the Court order Defendant to conclude its review of the remaining 321 pages and produce any responsive, non-exempt records by August 28, 2018. *Id.* Plaintiffs ask the Court to require the parties to file another Joint Status Report by no later than September 11, 2018. *Id.* at 3.

The Court understands that Defendant is busy processing many other FOIA requests, and that making determinations regarding whether or not records are subject to FOIA exemptions can be time consuming. Accordingly, the Court will allow Defendant until **September 28, 2018** to complete its review and release of any responsive, non-exempt records to Plaintiffs. That being said, Defendant is also **ORDERED** to make rolling productions between today and September 28, 2018, at reasonable intervals, of any records that are reviewed and found to be responsive and non-exempt.

In their Motion for a Preservation Order, Plaintiffs request that the Court order Defendant to preserve all records potentially responsive to Plaintiffs' FOIA requests that are located on former Director Comey's personal e-mail account. Pls.' Mot. at 4. Plaintiffs requested expedited consideration for their motion because they are "concerned records responsive to Plaintiffs' FOIA requests will be lost or destroyed." *Id.* at 1. In support of their motion, Plaintiffs recount that in a recently-released report, the Office of the Inspector General ("OIG") in the Department of Justice "identified numerous instances in which Comey used a personal email account (a Gmail account) to conduct FBI business" and concluded that "Comey's use of a personal email account on multiple occasions for unclassified FBI business [is] inconsistent with the DOJ Policy Statement." *Id.* at 2. In light of the findings in this report, Plaintiffs state that they "contacted Defendant and asked for it to confirm that the FBI had obtained possession of all records potentially responsive to Plaintiffs' FOIA requests that are located in Comey's personal email account." *Id.* Plaintiffs represent that they "were informed that the FBI allegedly had sent Comey a letter requesting that he preserve federal records responsive to Plaintiffs' request and that he return any agency records in his possession not already returned to the FBI." *Id.* at 3. Still, Plaintiffs are concerned that Director Comey possesses records responsive to their requests and that those records are going to be lost or destroyed.

Defendant opposes Plaintiffs' motion on two grounds. *See* Def.'s Opp'n to Pls.' Mot. for a Preservation Order, ECF No. 15. First, Defendant argues that Plaintiffs have not demonstrated that there is any reason to believe that Director Comey would possess any responsive records on his personal e-mail account that are not already in the FBI's possession. *Id.* at 4. Each of the instances cited in the OIG report of Director Comey using his personal e-mail account involved a transmission either to or from a government account, which means—Defendant argues—that Defendant would capture those communications in its search of government files. *Id.* at 4-5. In addition, Defendant argues that Director Comey's Chief of Staff has stated that the former Director's use of his personal e-mail was rare, and that he deleted any work e-mails from his personal account and cleared the deleted folder. *Id.* at 5. Also, in a recent communication with the Defendant, a representative of former Director Comey has represented that the Director is unaware of any responsive records in his possession. *Id.*

Second, Defendant argues that Plaintiffs cannot demonstrate that the records on the former Director's personal e-mail, if they existed, would be lost without a preservation order because Director Comey has already agreed to preserve responsive records if he discovers any. *Id.* at 5-6. In support of this contention, Defendant has submitted the declaration of Michael G. Seidel, Defendant's current Assistant Section Chief of the Record/Information Dissemination Section, Information Management Division. *See* Decl. of Michael G. Seidel, ECF No. 15-1. Mr. Seidel states that "FBI counsel reminded Director Comey of his legal obligations to preserve agency records and formally requested that he take all necessary and reasonable steps to ensure preservation of agency records or potential agency records within the scope of Plaintiff's FOIA request on his personal email account, if any such records existed." *Id.* at ¶ 10. Mr. Seidel attests that "Counsel for former Director Comey acknowledged receipt of the correspondence via e-mail . . . and advised that Director Comey will comply with his preservation obligations but is unaware of any responsive agency records residing in his personal e-mail account." *Id.* at ¶ 11.

In their reply, Plaintiffs have raised concerns that the measures Defendant have taken to ensure that Director Comey will preserve responsive records relate only to Plaintiff Judicial Watch's FOIA request, and not Plaintiff DCNF's separate request. *See* Pls.' Reply in Support of their Mot. for Preservation Order, ECF No. 16.

In order to avoid any possible issues later in this litigation, the Court will **GRANT** Plaintiffs' Motion. Defendant is **ORDERED** to take all necessary and reasonable steps to ensure that any records that are potentially responsive to either of the Plaintiffs' FOIA requests located on former Director Comey's personal e-mail account are preserved. Although it contends that such an order is unnecessary, Defendant has not explained why this preservation order would prejudice Defendant or cause any undue burden. Indeed, it appears that Defendant is taking steps to ensure the preservation of these records already. The duration of this order is limited: it lasts only until a final determination as to whether the former Director in fact possesses any responsive records is made. This Order should not be interpreted in any way as indicating that the Court has taken any position as to whether the former Director's e-mail account will contain any responsive records. It also should not be interpreted in any way as expressing any concern on the Court's behalf that Defendant or Director Comey would lose or purposefully destroy responsive records. The Court is issuing this preservation order simply because it does not appear to burden Defendant, and it will limit the possibility that the retention of these records, should they exist, might create a dispute at a later stage of this case.

SO ORDERED.

/s/

COLLEEN KOLLAR-KOTELLY
United States District Judge