IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH,

Plaintiff,

v.

JOHN F. KERRY, in his official capacity as SECRETARY OF STATE OF THE UNITED STATES,

Defendant.

Civil Action No. 1:15-cv-00785-JEB

DEFENDANT'S MOTION TO CONSOLIDATE
AND
MOTION TO EXTEND DATE TO RESPOND TO THE COMPLAINT,
WITH INCORPORATED MEMORANDUM IN SUPPORT

Defendant John F. Kerry, Secretary of State of the United States, hereby moves the Court pursuant to Federal Rule Civil Procedure 42 to consolidate this civil action with another, more recently filed civil action, *Cause of Action Institute v. Kerry*, No. 1:15-cv-01068-JEB, that is based on the same events and raises similar claims. Defendant Kerry further requests that the Court extend his obligation to respond to the Complaint in the present case until September 14, 2015, the due date for the response to the Complaint in *Cause of Action Institute*. The reasons for this motion are set forth in more detail below.

1. Plaintiff Judicial Watch brings the present case against Secretary of State John F. Kerry under the Federal Records Act ("FRA") and the Administrative Procedure Act ("APA") to "challenge[] the failure of Defendant Kerry to take any action to recover emails of former Secretary of State Hillary Clinton and other U.S. Department of State . . . employees unlawfully

removed from the agency" (referred to in this Complaint as "the Clinton emails"). Compl. (No. 1:15-cv-000785-JEB), at 1. Plaintiff asserts that defendant Kerry has violated his duties under the FRA "by failing to notify the Archivist concerning the unlawful removal of the Clinton emails and by failing to initiate action through the attorney general to recover the Clinton emails." *Id.* ¶ 25. Plaintiff requests that the Court (1) declare the Clinton emails to be records subject to the FRA; (2) declare that defendant Kerry's failure to take any action to recover the Clinton emails is "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the FRA"; and (3) order defendant Kerry "to take action to recover the Clinton emails in accordance with the FRA," *e.g.*, by notifying the Archivist concerning the unlawful removal of the emails and by initiating action through the Attorney General to recover them. *Id.* at 7.

2. In *Cause of Action Institute v. Kerry*, No. 1:15-cv-01068-JEB, plaintiff Cause of Action Institute ("COAI") brings suit against defendant Kerry and David S. Ferriero, Archivist of the United States, under the FRA and the APA to compel them "to comply with their statutory duty to initiate legal action . . . for recovery of federal records unlawfully removed from the custody of the Department of State . . . and stored on a personal computer server in the exclusive control and custody of former Secretary of State Hillary Rodham Clinton." Compl. (No. 1:15-cv-01068-JEB), at 1-2. COAI asserts that the defendants have violated their duties under the FRA "by failing to initiate action through the Attorney General to recover the unlawfully removed records" and, in Defendant Ferriero's case, by failing to notify Congress of such action. *Id.* ¶¶ 61-62. COAI further asserts that these are "non-discretionary, mandatory duties." *Id.* ¶ 66. COAI requests that the Court (1) declare Clinton's emails to be subject to the FRA and that Clinton violated the FRA; (2) declare that "defendants, by their failure to initiate legal action in this case,

violated the" FRA; and (3) order defendants "in the form of injunctive and mandamus relief . . . to comply with [the FRA] by initiating legal action against Clinton through the Attorney General to take Clinton's computer server and recover the unlawfully removed and/or destroyed email records." *Id.* at 13.

3. In sum, both cases arise out of former Secretary of State Clinton's use of emails stored on her personal server in the course of her government duties, and both cases seek court orders directing defendants to take action to recover these emails pursuant to the FRA.

4. In deciding whether to consolidate, courts must "weigh the risk of prejudice and confusion wrought by consolidation against the risk of inconsistent rulings on common factual and legal questions, the burden on the parties and the court, the length of time, and the relative expense of proceeding with separate lawsuits if they are not consolidated." *Nat'l Ass'n of Mort. Brokers v. Bd. of Governors of the Fed. Reserve Sys.*, 770 F. Supp. 2d 283, 286 (D.D.C. 2011). The consolidation of actions raising similar factual and legal questions is appropriate regardless of the presence of different claims or different issues of law or fact; it is sufficient if there is any common question of law or fact. *See id.* at 287 (consolidation appropriate where, despite differences, "there are extensive common questions of law and fact"); *Mylan Pharms., Inc. v. Henney*, 94 F. Supp. 2d 36, 43 (D.D.C. 2000) ("The plaintiffs' requests for different forms of relief do not vitiate the propriety of consolidation, but rather, consolidation is proper to *any or all* matters in issue which are common."), *vacated on other grounds*, 276 F.3d 627 (D.C. Cir. 2002). In addition, cases may be consolidated even where certain defendants are named in only one of the complaints. *Nat'l Ass'n of Mort. Brokers*, 770 F. Supp. 2d at 286.

Consolidation of these two actions is appropriate because both arise out of the same events, present similar legal issues, and request similar relief. Consolidation would thus serve the interests of judicial economy. *See Harbison v. U.S. Senate Comm. on Foreign Relations*, 839 F. Supp. 2d 99, 105 (D.D.C. 2012) (consolidating cases that "arise from the same core factual allegations, involve mostly the same parties, and vary only in the nature of the legal claims asserted against the parties"); *Hanson v. District of Columbia*, 257 F.R.D. 19, 22 (D.D.C. 2009) (consolidating cases brought by different plaintiffs challenging the District of Columbia's gun laws because "consolidation would save time and effort for the court and for the defendants by resolving this issue in one proceeding rather than two"). Consolidation is warranted even though there are some minor differences between the cases with regard to the claims asserted and relief requested (*e.g.*, Ferriero is a defendant only in *Cause of Action* and *Cause of Action* includes a claim for mandamus relief). *See Nat'l Ass'n of Mort. Brokers*, 770 F. Supp. 2d at 286; *Mylan Pharms., Inc. v. Henney*, 94 F. Supp. 2d 43. Additionally, because both actions are at the same early stage of litigation, consolidation of these actions will not result in prejudice to any party. *See Hanson*, 257 F.R.D. at 22.

5. Defendant's due date to respond to the Complaint in the present action is currently August 7, 2015. Defendant requests that this deadline be extended to the due date for the response to the Complaint in *Cause of Action Institute*, which is September 14, 2015. Additional time is needed because undersigned counsel was only recently assigned to these cases. The prior attorney assigned to these cases could no longer work on them because of unexpected developments in other matters. Current counsel requires additional time in order to

provide defendant adequate time to consult internally, analyze the legal issues, accommodate existing vacation schedules for the month of August, and prepare responses to the complaints.

6. On July 23, 2015, undersigned counsel, Carol Federighi, spoke with counsel for Judicial Watch, James Peterson, who advised that Judicial Watch opposes the present motion. On July 24, 2015, Ms. Federighi also contacted counsel for Cause of Action Institute, Lee Steven, who advised by email that COAI neither supports nor opposes consolidation**.**

WHEREFORE defendant respectfully requests that the Court consolidate this civil action with *Cause of Action Institute v. Kerry*, No. 1:15-cv-01068-JEB, and extend his obligation to respond to the Complaint in the present case until September 14, 2015. A proposed Order is submitted.

Dated: July 24, 2015

Respectfully submitted,

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