

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

| | | |
|-----------------------------------|---|---------------------------------|
| JUDICIAL WATCH, INC., |) | |
| |) | |
| and |) | |
| |) | Civil Action No. 18-00967 (CKK) |
| THE DAILY CALLER NEWS FOUNDATION, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| U.S. DEPARTMENT OF JUSTICE, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

PLAINTIFFS' MOTION FOR PRESERVATION ORDER

Plaintiff Judicial Watch, Inc. and the Daily News Caller Foundation, by counsel, respectfully submit this motion for an order requiring Defendant U.S. Department of Justice to preserve the records at issue in this Freedom of Information Act case. Pursuant to LCvR 7(f), Plaintiffs request a hearing on this motion. Plaintiffs also request expedited consideration of this motion because they are concerned records responsive to Plaintiffs' FOIA requests will be lost or destroyed. As grounds therefor, Plaintiffs state as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

1. This case concerns two FOIA requests for records of ex-FBI Director James Comey. Judicial Watch submitted a request for memoranda by Comey summarizing conversations with President Barack Obama, Vice President Joe Biden, Secretary of State Hillary Clinton, Senator Chuck Schumer, Representative Nancy Pelosi, and Senator John McCain, and any handwritten notes used to prepare such memoranda. DCNF submitted a request for records

that identify and describe all meetings between former FBI Director James Comey and President Barack Obama.

2. In a report issued in June 2018, the Office of the Inspector General in the U.S. Department of Justice stated, “We identified numerous instances in which Comey used a personal email account (a Gmail account) to conduct FBI business.” U.S. Department of Justice Office of Inspector General, Oversight & Review Division 18-04, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election (June 2018, available at <https://www.justice.gov/file/1071991>), at 425.

3. In addition, the OIG concluded that “given the absence of exigent circumstances and the frequency with which the use of personal email occurred, Comey’s use of a personal email account on multiple occasions for unclassified FBI business [is] inconsistent with the DOJ Policy Statement.” *Id.* at 426.

4. Under the law, “[a]n officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee- (1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or (2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record.” 44 U.S.C. § 2911.

5. On June 27, 2018, Plaintiffs 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.

6. Plaintiffs followed up on at least two occasions. Because Plaintiffs had not received a response, on July 25, 2018, Plaintiffs asked Defendant for its position on this motion.

7. In response, Plaintiffs 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.¹

8. Plaintiffs have asked for a copy of the letter. Defendant refuses to provide it.

9. Considering the troubling finding by the OIG and because Plaintiffs do not know specifically what the FBI asked Comey to do and what, if any, steps Comey is taking to ensure preservation, Plaintiffs are concerned records responsive to Plaintiffs' FOIA requests will be lost or destroyed.

10. Plaintiffs' request is nothing out of the ordinary. At least three other judges of this Court have granted such requests in the last two years. *See* Preservation Order, *Judicial Watch, Inc. v. U.S. Department of Homeland Security*, Case No. 16-00967-RDM (D.D.C. Jan. 18, 2017); *see also* Minute Order, *Judicial Watch, Inc. v. U.S. Department of Justice*, Case No. 17-cv-00029-EGS (D.D.C. Jan. 17, 2017); Memorandum Opinion and Order, *Competitive Enterprise Institute v. Office of Science and Technology Policy*, Case No. 14-00765-GK (D.D.C. Dec. 12, 2016).

11. In particular, Judge Moss ordered individuals – including two *former* government officials – “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.” Preservation Order, *Judicial Watch, Inc. v. U.S. Department of Homeland Security*, Case No. 16-00967-RDM (D.D.C. Jan. 18, 2017).

12. Plaintiffs respectfully request expedited consideration of this motion.

¹ The FBI allegedly sent the letter on July 26, 2018, the day in which Plaintiffs anticipated filing this motion.

13. Defendant opposes this motion.

WHEREFORE, Plaintiffs respectfully request the Court order Defendant to preserve all records potentially responsive to Plaintiffs' FOIA requests located on ex-Director Comey's personal email account.

Dated: July 27, 2018

Respectfully submitted,

/s/ Michael Bekesha

Michael Bekesha

D.C. Bar No. 995749

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Counsel for Plaintiffs

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[Proposed] Order

Upon consideration of Plaintiff’s Motion for Preservation Order and the entire record herein, it is hereby ORDERED that:

1. Plaintiff’s Motion for Preservation Order is GRANTED; and
2. Defendant shall preserve all records potentially responsive records to Plaintiffs’ FOIA requests located on ex-Director Comey’s personal email account.

SO ORDERED.

DATE: _____

The Hon. Colleen Kollar-Kotelly, U.S.D.J.