



February 9, 2017

VIA ELECTRONIC MAIL

U.S. Coast Guard
Office of the Administrative Law Judge
ATTN: Timothy A. O'Connell, Attorney-Advisor
Coast Guard Island, Bldg. 54A
Alameda, CA 94501-5100
E-mail: Timothy.A.O'Connell@uscg.mil

Re: Dep't of Homeland Sec., FOIA Appeal 2016-HQAP-00065

Dear Mr. O'Connell,

This letter is in response to your interim determination on Cause of Action Institute's ("CoA Institute") Freedom of Information Act ("FOIA") appeal, 2016-HQAP-00065, which concerns the Department of Homeland Security's ("DHS") response to CoA Institute's September 11, 2015 FOIA request, 2015-HQFO-00691.¹ In its appeal, CoA Institute raised various issues, including the failure of the DHS to produce legible records; failure to reasonably segregate responsive material; failure to conduct an adequate search; and failure to properly invoke Exemption 5, in conjunction with the deliberative process and attorney-client privileges, and Exemption 6.

In light of your remand of the DHS's determination "for further explanation and clarification," we wish to notify you of a similar FOIA request that is now the subject of pending litigation and directly impacts the agency's processing of CoA Institute's request. On December 29, 2015, Judicial Watch filed a FOIA request for all work-related email sent to or from personal accounts maintained by four, now-former, DHS officials—namely, Secretary Jeh Johnson, Deputy Secretary Alejandro Mayorkas, Chief of Staff Christian Marrone, and General Counsel Stevan Bunnell.² The records sought by Judicial Watch are also responsive, in part, to Item Three of CoA Institute's September 11, 2015 FOIA request.³

After Judicial Watch filed suit to compel disclosure, Judge Randolph D. Moss issued a preservation order on January 18, 2017, requiring the former DHS officials to copy potentially

¹ Letter from Timothy O'Connell, U.S. Coast Guard, to CoA Inst. (Feb. 2, 2017) (attached as Exhibit 1).

² See Compl. at ¶ 5, *Judicial Watch, Inc. v. Dep't of Homeland Sec.*, No. 16-0967 (D.D.C. filed May 23, 2016).

³ Item Three seeks "[a]ll official records created by any waiver recipient . . . on Internet Webmail or other person e-mail account[s] from April 1, 2014 to the present." Letter from CoA Inst. to Karen Neuman, Dep't of Homeland Sec. (Sept. 11, 2015) (on file with CoA Inst.). The DHS failed to produce any records responsive to Item Three, and the adequacy of the agency's search, in that respect, is one of the issues currently on appeal.

responsive material from their private email accounts onto portable thumb drives.⁴ The court issued its directive “out of [an] abundance of caution,” despite the fact that the DHS already had sent preservation notices to the four individuals involved.⁵

The issuance of the January 18, 2017 preservation order, together with the DHS’s admission that it has, in fact, undertaken efforts to retrieve and process work-related email from the personal accounts of its former employees, demonstrates the inadequacy of the agency’s response to Item Three of CoA Institute’s FOIA request, which is broader in scope than Judicial Watch’s request and encompasses *all* the high-ranking officials granted waivers from the DHS’s agency-wide rule prohibiting the use of web-based email programs. CoA Institute urges you to take these facts under consideration as you prepare your final determination of our appeal. The DHS should be ordered to search for, process, and produce all records responsive to Item Three of our September 11, 2015 FOIA request.

If you have any questions about this request, please contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you for your attention to this matter.



RYAN P. MULVEY
COUNSEL

CC: Ms. Karen Neuman
Chief Privacy Office/Chief FOIA Officer
U.S. Department of Homeland Security

⁴ Preservation Order at 2, *Judicial Watch Inc. v. Dep’t of Homeland Sec.*, No. 16-0097 (D.D.C. Jan. 18, 2017) (attached as Exhibit 2).

⁵ *Id.*

EXHIBIT

1



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5720
February 2, 2017

Mr. Ryan P. Mulvey
Cause of Action
1919 Pennsylvania Avenue NW
Suite 650
Washington, D.C. 20006
RE: DHS FOIA APPEAL 2016-HQAP-00065

Dear Mr. Mulvey:

This letter is in response to your Freedom of Information Act (FOIA) appeal regarding the Department of Homeland Security (DHS) Privacy Office's (Agency) May 06, 2016 letter concerning FOIA Request 2016-HQFO-00691. Specifically, you are appealing the adequacy of the Agency's search, application of FOIA Exemptions (b)(5) and (b)(6), and failure to reasonably segregate responsive material and to produce legible records.

Your initial request sought records from April 1, 2014 to present, including:

1. All records reflecting or referring to waivers from Department of Homeland Security ("DHS") Sensitive Systems Policy Directive 4300A that were granted to Secretary Jeh Johnson, Deputy Secretary Alejandro Mayorkas, or any other DHS official including but is not limited to, formal waivers, informal waivers, and any records concerning the approval or denial of a waiver request (e.g., correspondence with or amongst employees of the Office of the Chief Information Officer related to the processing of a waiver request);
2. All records containing guidelines, policies, or rules for official record retention that were issued or otherwise available to the waiver recipients identified in item one of this request; and,
3. All official records created by any waiver recipient identified in item one of this request on Internet Webmail or other personal e-mail account.

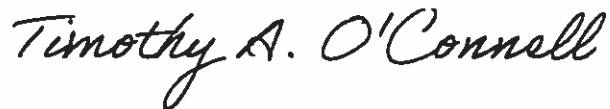
In response to your initial request, the Agency searched the DHS Management Directorate and Chief Information Officer for responsive records. This search yielded 691 pages, 24 of which the Agency released in full. Of the remaining 667 pages, 459 were partially redacted, and 208 were withheld in their entirety pursuant to FOIA Exemptions (b)(5) and (b)(6).

Pursuant to a memorandum of agreement, the United States Coast Guard Office of the Chief Administrative Law Judge is reviewing the FOIA appeals for the Department of Homeland Security General Counsel's office. Therefore, the Office of the Chief Administrative Law Judge will be rendering the official appeal decision on behalf of the Department of Homeland Security.

After a thorough review of your appeal and all applicable documents I am remanding the Agency's determination for further explanation and clarification. Based upon the record, I am unable to determine whether the Agency properly applied the FOIA Exemptions at issue. Upon receiving clarifying information, I will issue a final determination letter in this matter.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,



TIMOTHY A. O'CONNELL
Attorney Advisor
United States Coast Guard

Copy : FOIA Officer, DHS Privacy Office
Sent: Via first class mail to the above address.

EXHIBIT

2

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