UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 18-1800 (APM)

PLAINTIFF'S MOTION FOR PRESERVATION ORDER
AND REQUEST FOR EXPEDITED CONSIDERATION

Plaintiff Cause of Action Institute ("CoA Institute") respectfully moves the Court for an order to compel Defendant U.S. Department of Justice ("DOJ"), and one of its former employees, to preserve all agency records potentially responsive to one of the Freedom of Information Act ("FOIA") requests at issue in this lawsuit. Pursuant to Local Rule 7(m), CoA Institute has conferred with Defendant, which intends to oppose this motion. CoA Institute also requests expedited consideration of its motion given the danger for the loss or destruction of agency records in a former government employee's personal email account(s).

In support of this motion, CoA Institute states the following:

FACTUAL AND PROCEDURAL BACKGROUND

1. On August 1, 2018, CoA Institute filed this lawsuit under the FOIA, seeking access to agency records maintained by Defendant through its various components, including the Office of Information Policy ("OIP"). *See* Compl. ¶ 1, ECF No. 1.

2. Records responsive to the three FOIA requests at issue in this lawsuit reflect the use of personal email to conduct official government business by former FBI Director James

Comey, former FBI Chief of Staff James Rybicki, and former DOJ Director of Public Affairs Sarah Isgur Flores. *Id.* ¶ 2. The instant motion concerns only one of these three requests, the one dealing with the emails of Ms. Flores.

3. That FOIA request, dated March 2, 2017, was directed to OIP and sought "[a]ny email, including attachments, sent by Sarah Isgur Flores on or about March 1, 2017 from a non-governmental email account, containing a statement in response to news reports that Attorney General Jeff Sessions met with the Russian Ambassador during the 2016 Presidential Election." Compl. Ex. 5 at 2, ECF No. 1-5. CoA Institute also requested "[a]ll other emails, including attachments, sent or received by Sarah Isgur Flores on a non-governmental email account that were for the purpose of conducting official government business." *Id.*

4. At the time of the filing of the Complaint, OIP had failed to provide a final response to CoA Institute's FOIA request. *See* Compl. ¶¶ 29–31.

5. By letter, dated September 27, 2018, OIP finally issued its determination and released 112 pages with partial redactions under Exemption 5, in conjunction with the deliberative process privilege, and Exemption 6. *See* Decl. of Ryan P. Mulvey ¶ 4; Mulvey Decl. Ex. 1 at 1. OIP withheld sixty-eight pages in full under Exemption 6, and withheld portions of certain records as "non-responsive." *See* Mulvey Decl. ¶ 4; Mulvey Decl. Ex. 1 at 1.

6. In its response letter, OIP explained that "Ms. Flores forwarded emails sent to her personal account to her official Department of Justice email account, including through an automatic forward." Mulvey Decl. Ex. 1 at 1. "As such, all of these emails were located pursuant to [OIP's] search of Ms. Flores' official Department of Justice email account." *Id.*

7. OIP's response letter did not address Ms. Flores's efforts, if any, to capture outgoing work-related correspondence from her personal email account to an official DOJ record-

keeping system. Moreover, OIP's response suggests that the agency did not direct Ms. Flores to conduct an independent search of her personal email account for the purposes of responding to CoA Institute's FOIA request.

8. Soon after OIP provided its final response, CoA Institute raised concerns about the adequacy of the agency's search for responsive records. Mulvey Decl. ¶ 5. CoA Institute pointed to a social media post by a journalist and political correspondent, which indicated that Ms. Flores had used "her personal Gmail account" to respond to a *Washington Post* story about former Attorney General Jeff Sessions. Mulvey Decl. ¶ 7; Mulvey Decl. Ex. 2. The journalist described Ms. Flores's email as an "[o]n the record statement." Mulvey Decl. Ex. 2.

9. Ms. Flores posted about the same statement only minutes later. Mulvey Decl. ¶ 8. That "tweet" included a screenshot image of the outgoing press statement concerning former Attorney General Sessions. *See* Mulvey Decl. Ex. 3.

10. These social media posts, taken together, are evidence of the existence of an agency record reflecting an official press statement that Ms. Flores sent from her personal Gmail account on March 1, 2017. Yet such a record was not included in OIP's final response and production to CoA Institute. *Id.* ¶ 10.

11. CoA Institute explained to Defendant, by and through counsel, that a supplemental search may be required to locate the missing March 1, 2017 email. Such a search would entail DOJ directing Ms. Flores to search her Gmail account because the email in question may not have been properly forwarded to an official DOJ record-keeping system.

12. Counsel for CoA Institute provided Defendant with links to the aforementioned Twitter posts in November 2018. *Id.* ¶ 9. Nevertheless, Defendant refused to conduct

supplemental searches. Defendant has instead indicated that it "is willing to defend the adequacy of its search in [summary judgment] briefing if necessary." Joint Status Rep. at 2, ECF No. 15.

13. On or about February 19, 2019, CoA Institute learned of Ms. Flores's imminent departure from DOJ. Mulvey Decl. ¶ 11 (citing Gerry Smith, *Former Trump Aide to Help Run CNN's 2020 Election Coverage*, Bloomberg, Feb. 19, 2019, https://bloom.bg/2VfLzce ("Sarah Isgur will join CNN next month, according to the network. Over the past two years, she was a spokeswoman and senior counsel at the Justice Department.")).

14. Various news media sources reported extensively on Ms. Flores's intended move to CNN. *See, e.g.*, Eliana Johnson & Michael Calderone, *Ex-Sessions spokeswoman to join CNN as political editor*, Politico, Feb. 19, 2019, https://politi.co/2TgcOGd; *see also* Paul Farhi, *CNN hires a prominent conservative to help direct its political coverage*, Wash. Post, Feb. 19, 2019, https://wapo.st/2T2C8Qw.

15. Although Ms. Flores was expected to leave public service sometime in March 2019, opposing counsel informed CoA Institute yesterday evening—that is, on February 26, 2019—that Ms. Flores had, in fact, already left DOJ on February 15, 2019. *See* Mulvey Decl. ¶ 13. CoA Institute is filling the instant motion on February 27, 2019.

16. Without a preservation order, Defendant may be unable to secure access to Ms. Flores's personal email account(s) to conduct supplemental searches, except insofar as Defendant can secure voluntary compliance. Ms. Flores's recent departure from public service raises issues concerning the preservation of agency records under the FOIA, as well as the potential unlawful removal and alienation of federal records, as defined by the Federal Records Act ("FRA"). Finally, without a preservation order, it is unclear to what extent records management rules would obligate

Ms. Flores to preserve work-related correspondence in her personal email account that may not yet have been turned over to the federal government.

STANDARD OF REVIEW

17. "A Motion to Compel Preservation is subject to the same analytical framework as a motion for injunctive relief." *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, No. 14-765, 2016 WL 10676292, at *2 (D.D.C. Dec. 12, 2016) [hereinafter *CEI*]. This Court must therefore consider:

> (1) the likelihood that [CoA Institute] . . . will prevail on the merits . . . ; (2) the likelihood that [CoA Institute] . . . will be irreparably harmed absent [a preservation order]. . . ; (3) the prospect that others will be harmed if the Court grants [the motion] . . . ; and (4) the public interest in granting the [motion].

Id. (citing *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 593 F. Supp. 2d 156, 159 (D.D.C. 2009)). These factors are "balanced on a sliding scale, and a party can compensate for a lesser showing on one factor by making a very strong showing on another factor." *Id.* (citation and internal quotation marks omitted).

18. Some courts have adopted slightly different tests for preservation orders. *See, e.g.*, *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (U.S. Ct. Fed. Claims 2004) ("[Judicial] restraint requires that one seeking a preservation order demonstrate that it is necessary and not unduly burdensome."); *see also Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433–34 (W.D. Pa. 2004) (adopting a three-factor test). The differences between these tests, however, have been described as "more apparent than real." *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006).

LEGAL ARGUMENT

19. As set forth above, the Court should take into account four factors in ruling on CoA Institute's motion. Whether considered independently or together, each of these factors weighs

heavily in favor of granting the instant motion to ensure the preservation of work-related records created or received on Ms. Flores's personal email accounts. Ms. Flores's departure from federal service will complicate Defendant's ability to access government property—namely, agency records under the FOIA and federal records under the FRA—if supplemental searches are required.

Likelihood of Success on the Merits

20. When considering a motion for a preservation order, "'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *CEI*, 2016 WL 10676292, at *2 (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). "'A court is not required to find that ultimate success by the movant is a mathematical probability.'" *Id.* (cleaned up and citation omitted).

21. CoA Institute has pointed to independent evidence supporting the conclusion that Defendant failed to conduct an adequate search for responsive records. *See Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) ("If . . . the record leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper."). Ms. Flores's social media activity identifies a record—namely, a press statement created as part of her official duties—that was not included in OIP's production. *See supra* ¶¶ 8–10. Contemporaneous social media activity by a journalist confirms that this agency record was distributed from a private email account.

22. Defendant cannot meet its burden of demonstrating "beyond material doubt" that it undertook a search "'reasonably calculated to uncover all relevant documents.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citation omitted); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). The press statement highlighted in Ms. Flores's "tweet" cannot be found amongst the records produced by OIP and

Defendant's communications to CoA Institute demonstrate that it has not searched Ms. Flores's private email for potentially responsive records. *See supra* ¶ 6. Together, that is a "positive indication[] of overlooked materials.'" *Valencia-Lucena*, 180 F.3d at 326, 392 (citation omitted). Yet Defendant refuses to conduct any supplemental searches.

23. It bears noting that the D.C. Circuit has recognized that work-related records maintained on the private account of an agency official or employee are subject to agency control and, therefore, must be considered potentially responsive to a FOIA request. *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 827 F.3d 145, 150 (D.C. Cir. 2016); *see also id.* at 149 ("[A]n agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door."). That principle should remain unchanged if an employee leaves federal service, but still maintains possession of agency records.

Risk of Irreparable Harm

24. CoA Institute risks irreparable harm unless the requested preservation order is granted. Without the order, there is nothing to prevent Ms. Flores from destroying work-related records on her personal email accounts, and there is no assurance of her cooperation in conducting supplemental searches at Defendant's direction. To the extent there are records subject to the FOIA maintained on Ms. Flores's account, but which have not yet been identified and processed, their destruction would leave CoA Institute with no adequate remedy.

25. As multiple courts in this jurisdiction have noted, "absent a Preservation Order it is unclear whether [an agency official] would be required to maintain and produce [agency records] if he [or she] left his position at [the agency]." *CEI*, 2016 WL 10676292, at *3. Indeed, a departing official's mere promises are not a replacement for a judicially-backed order. *Id.* ("'Unlike a court

order, a declaration is not punishable by contempt.' If the [agency] emails were destroyed for some reason, Plaintiff would have no recourse whatsoever." (internal citation omitted)).

Potential Harm to Other Parties

26. The requested preservation order would not harm any third party, nor would it unreasonably invade Ms. Flores's privacy interests. The instant motion could hardly be described as an extraordinary request for relief. District judges in this jurisdiction have routinely granted similar motions in recent years as a matter of prudence. *See CEI*, 2016 WL 10676292, at *3 ("The Court is sensitive the privacy concerns of that would arise if it granted [the motion for preservation order] . . . , but [that] would not constitute an invasion of [a government official's] privacy."); *id.* at *4 (ordering agency employee to preserve emails from personal account, "including any archived emails and any deleted email archives, on a thumb drive to be kept in his possession"); *see also* Minute Order, *Judicial Watch, Inc. v. Dep't of Justice*, No. 17-29 (D.D.C. Jan. 17, 2017).

27. Courts also have entered preservation orders against former government officials after they have left public service. *See, e.g.*, Order, *Judicial Watch, Inc. v. Dep't of Justice*, No. 18-967 (D.D.C. Aug. 6, 2018), ECF No. 17 ("Defendant is ORDERED to take all necessary and reasonable steps to ensure that any records that are potentially responsive . . . [and] located on former [FBI] 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."); *see also* Preservation Order, *Judicial Watch, Inc. v. Dep't of Homeland Sec.*, No. 16-967 (D.D.C. Jan. 18, 2017), ECF No. 24 (ordering former Secretary of Homeland Security to save contents of private email account on a "portable thumb drive or hard drive to be kept in his possession")

28. The requested preservation order would further complement existing federal law and Defendant's implementing regulations. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request. *See Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act."); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998); *see also* 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.'"). Defendant's regulations reiterate the point. *See* 28 C.F.R. § 16.9 ("Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.").

29. Although this is not an FRA lawsuit—and notwithstanding the slight differences between the definitions of "agency records" under the FOIA and "federal records" under the FRA—Ms. Flores's departure from DOJ still presents concerns about the unauthorized alienation or destruction of records, *see* 44 U.S.C. § 3314, as well as the unlawful removal of records from the legal custody of an agency. *See id.* §§ 2905(a), 3105–06; *see also* 36 C.F.R. §§ 1222.24(a)(6), 1230.3(b), 1230.10(a). As such, the preservation order is justified.

The Public Interest

30. The public interest weighs heavily in favor of granting an order to preserve the work-related records in Ms. Flores's personal email accounts. *See CEI*, 2016 WL 10676292, at *4 ("'[T]he public interest certainly favors ensuring that records are preserved' while the Court considers whether their disclosure is appropriate under FOIA." (citation omitted)). If these records, which reflect the operation of the DOJ and its interaction with the media, are destroyed—

or if Defendant is unable to access Ms. Flores's account to conduct supplemental searches—the public access guaranteed by the FOIA will be frustrated and government transparency will suffer. *See, e.g.*, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (The FOIA serves as a "means for citizens to know 'what the Government is up to'" and it "defines a structural necessity in a real democracy." (citation omitted)); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989) (The rights afforded under the FOIA are a bulwark to the "fundamental principle of public access" to records of the administrative state, which can often be "'shielded unnecessarily from public view . . . [by] possibly unwilling official hands.'" (citation omitted)).

CONCLUSION

For the foregoing reasons, Plaintiff CoA Institute respectfully requests that the Court expeditiously grant the instant motion, order Defendant DOJ to take all necessary steps to preserve all records potentially responsive to CoA Institute's March 2, 2017 FOIA request, and order Sarah Isgur Flores to preserve the contents of her personal email accounts, insofar as it may contain responsive records. A Proposed Order is attached.

Dated: February 27, 2019

Respectfully submitted,

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