

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
CAUSE OF ACTION INSTITUTE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 18-cv-01800 (APM)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
)	

ORDER

Upon consideration of Plaintiff Cause of Action Institute’s Motion for Preservation Order, ECF No. 17, and the record presented, the court grants Plaintiff’s Motion. The four factors that the court must consider—on a “sliding scale”—weigh in favor of issuing a preservation order. *See Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (observing that, notwithstanding the Supreme Court’s decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), the “sliding scale” approach remains the binding standard for injunctive relief in this Circuit); *see also Competitive Enter. Inst. v. Office of Sci. & Tech. Pol’y*, No. 14-765, 2016 WL 10676292, *2 (D.D.C. Dec. 12, 2016) (applying injunctive relief standard to a motion to compel preservation).

First, Defendant has raised a “serious legal question” as to the adequacy of Defendant’s search of former DOJ employee Sarah Isgur Flores’ personal email account. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).¹ While

¹ The case law is not clear as to whether the “substantial likelihood of success” factor is relaxed in this context, similar to a stay pending appeal, such that making a showing of a “serious legal question” satisfies the likelihood-of-success prong, or whether the plaintiff must carry a heavier burden of making a showing closer to actual success on the merits. The court opts for the relaxed standard because, like a stay pending appeal, “little if any harm will befall other

Defendant's declarant, Vanessa Brinkmann, describes Ms. Flores' practices with respect to official emails that she *received* in her personal account, the declaration is silent as to how Ms. Flores treated official emails that *originated* from her personal account. *See* Def.'s Opp'n, ECF No. 19, Decl. of Vanessa R. Brinkmann, ECF No. 19-1, ¶ 14 (stating that Ms. Flores used an automatic forwarding function for incoming email and that, for "received [] work-related email," she either forwarded the email to her DOJ email account and responded from there, or responded from her personal account and copied her DOJ email account). The absent email described in Plaintiff's papers could be an email that originated from Ms. Flores' personal email account. Plaintiff therefore has raised a "serious legal question" as to the adequacy of Defendant's search.

Second, Plaintiff is likely to suffer irreparable harm in the absence of a preservation order. Ms. Brinkmann does not indicate what, if any, obligations Ms. Flores has as a former DOJ official to preserve records. Nor does Ms. Brinkmann state whether Ms. Flores has in any way modified her personal account settings (if possible) with respect to saving outgoing emails. Thus, a risk remains that responsive records could be lost.

Finally, the third and fourth factors, weigh in favor of a preservation order. The burden of such an order on Defendant and Ms. Flores is minimal, and the public interest clearly favors the preservation of official records.

Accordingly, for the foregoing reasons, Plaintiff's Motion is granted. The court orders the following:

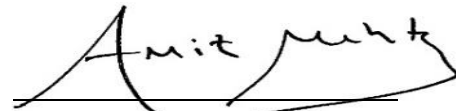
1. Defendant shall, as soon as practicable, send a preservation notice to Ms. Flores directing her not to delete any official email that remains stored within her personal email account.

interested persons or the public" from a preservation order and "denial of the order would inflict irreparable injury on the movant." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

2. Defendant shall coordinate with Ms. Flores to copy onto a portable thumb drive or some other storage device all emails stored within her personal email account, including those found in archived and deleted folders. Ms. Flores shall keep in her possession the copied emails until the court orders that they be searched.

3. Defendant shall notify the court of its compliance with this order by no later than May 2, 2019.

Dated: April 25, 2019



Amit P. Mehta
United States District Judge