

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

ELECTRONIC PRIVACY INFORMATION CENTER,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:17-cv-121 (RCL)
)	
FEDERAL BUREAU OF INVESTIGATION,)	
)	
Defendant.)	
)	

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL
PRESERVATION**

Defendant, the Federal Bureau of Investigation (“FBI”), opposes Plaintiff’s meritless Motion to Compel Preservation. The FBI has already committed to preserving the documents at issue, and Plaintiff has offered absolutely no evidence to suggest that the FBI is not complying with its legal obligations regarding document preservation and retention. Plaintiff has failed to meet its burden of demonstrating that a preservation order is necessary or that it will suffer irreparable harm without one. Accordingly, the Court should deny the motion.

BACKGROUND

In this FOIA case, Plaintiff seeks records related to the FBI’s investigation of Russian interference in the 2016 election. More specifically, Plaintiff’s FOIA request seeks the following four categories of documents:

1. All records including, but not limited to, memos, reports, guidelines, procedures, summaries, and emails pertaining to the FBI’s investigation of Russian-sponsored cyber attack on the RNC, DNC, and DCCC.
2. All records of communications to the RNC, DNC, and DCCC regarding the threat of Russian interference in the 2016 Presidential election.
3. All records of communications with other federal agencies regarding Russian interference in the 2016 Presidential election.

4. All records including, but not limited to, memos, reports, guidelines, and procedures pertaining to the FBI's procedure to notify targets of cyber attacks.

Complaint ¶ 23, ECF No. 1.

The production schedule for the case requires the FBI to produce all non-exempt records responsive to category 4 of the request, or otherwise respond to that portion of the request, by May 11, 2017. ECF No. 13. The schedule further orders the FBI to produce non-exempt records responsive to the other categories of records listed in Plaintiff's FOIA request, or to otherwise respond to those portions of Plaintiff's requests, at specified dates over the coming months.

Consistent with the Court's Order, the FBI produced on May 11, 2017 all non-exempt records responsive to category 4 of Plaintiff's request. The FBI sent the records to Plaintiff by U.S. mail, as is its customary practice. Counsel for the Plaintiff emailed undersigned counsel the next morning, May 12, to complain that Plaintiff had not yet received the May 11 production. Counsel for the Plaintiff contended that the delayed production was "cause for grave concern, given the events of this week," and threatened to move to compel preservation of all records and to compel immediate production of all responsive records due on May 11. Counsel for the Plaintiff provided no basis for seeking a preservation order. Undersigned counsel quickly responded to counsel for the Plaintiff's email and explained that the FBI sent the production out by U.S. mail the day before. Undersigned counsel also provided counsel for the Plaintiff with electronic copies of the records mailed by the FBI, as a courtesy.

Plaintiff nonetheless filed the instant motion to compel preservation, seeking "to preserve all agency records responsive to or related to this [FOIA] case." Pl.'s Mot. to Compel Preservation ("Pl.'s Mot.") ¶ 1. Plaintiff's proposed order requires the FBI to preserve "(1) all records responsive to [Plaintiff's] Freedom of Information Act request, (2) all records related to this

litigation, and (3) all records related to the subject matter of EPIC's request, the Russian interference in the 2016 Presidential Election." Pl.'s Proposed Order, ECF No. 14-2.

ARGUMENT

I. Standard of Review

Plaintiff recognizes that its motion for a preservation order seeks injunctive relief, *see* Pl.'s Mot. at 4 (arguing that all four considerations for awarding preliminary injunctive relief support its requested preservation order), and the FBI agrees that, prior to the issuance of any preservation order, Plaintiff must establish the appropriateness of equitable relief. *See, e.g., Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 WL 21443404, at *1 (N.D. Tex. Apr. 16, 2003) ("A motion to preserve evidence is an injunctive remedy and should issue only upon an adequate showing that equitable relief is warranted."); *United States v. Sum of \$70,990,605*, 991 F. Supp. 2d 154, 163 (D.D.C. 2013) (analyzing a request for an injunction prohibiting destruction of evidence under the traditional preliminary injunction framework).

Courts have employed different tests in deciding whether to issue a preservation order. *See, e.g., Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (2004) (creating a two-factor test, requiring a party "seeking a preservation order [to] demonstrate that it is necessary and not unduly burdensome"); *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433–34 (W.D. Pa. 2004) (creating a three-factor test, weighing the degree of concern about continued preservation of evidence, the irreparable harm likely to result from destruction, and any burdens caused by issuing a preservation order). Ultimately, the difference between these varying tests is "more apparent than real," *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006), because fundamentally each test requires a court to strike an equitable balance between (1) the

likelihood that records will be lost absent a court order, and (2) any harms to the parties or other entities and individuals stemming from issuance of a preservation order.¹

Regardless of the particular legal standard used, the burden is always on the moving party to establish that a preservation order is warranted. *See, e.g., Pueblo of Laguna*, 60 Fed. Cl. at 137–38; *Humble Oil & Ref. Co.*, 262 F. Supp. at 42–43. Furthermore, because the authority to issue a preservation order stems from a court’s inherent authority, the Court must proceed “with restraint and discretion.” *Pueblo of Laguna*, 60 Fed. Cl. at 137 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)).

II. A Preservation Order is Unnecessary to Preserve the Records at Issue in this Case

Plaintiff’s motion is wholly unnecessary because the FBI is already legally obligated to preserve records responsive to Plaintiff’s FOIA request, and it has informed Plaintiff that it is doing just that. As Plaintiff’s own motion recognizes, the preservation order would do no more than “ensure FBI compliance with existing legal obligations.” Pl.’s Mot. ¶ 26. Because Plaintiff has offered no evidence whatsoever to support its contention that the FBI will not meet or is not meeting its obligation to preserve records responsive to Plaintiff’s FOIA request, Plaintiff has failed to carry its burden of showing the necessity of a preservation order in this case.

In FOIA cases, unlike most other types of civil cases, the documents are the very relief sought. Here, the FBI is obligated, pursuant to this Court’s scheduling order, to produce (and thus, by implication, not destroy) all non-exempt records responsive to Plaintiff’s request, or otherwise respond to that request, by no later than July 25, 2017. ECF No. 13. This is in addition to the

¹ The likelihood of success on the merits factor is rarely determinative, even for courts that employ the traditional preliminary injunction framework. *See, e.g., Madden*, 2003 WL 21443404, at *1; *Pepsi-Cola Bottling Co. v. Cargill, Inc.*, 1995 WL 783610, at *3–4 (D. Minn. Oct. 20, 1995); *Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 42 (E.D. La. 1966).

FBI's obligation, as a party to litigation, "to preserve and also to not alter documents it knew or reasonably should have known were relevant . . . if it knew the destruction or alteration of those documents would prejudice [its opponent]"). *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1481 (D.C. Cir. 1995). And, the FBI, as a federal agency, is "already barred from destroying many records which would be responsive, for example, under the Federal Records Act." *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 279 (D.D.C. 2012).

Accordingly, as the FBI is already under an obligation to preserve the responsive records at issue, a preservation order is unnecessary. *See Hester v. Bayer Corp.*, 206 F.R.D. 683, 685 (M.D. Ala. 2001) ("To supplement every complaint with an order requiring compliance with the Rules of Civil Procedure would be a superfluous and wasteful task, and would likely create no more incentive upon the parties than already exists."); *Landmark Legal Found.*, 910 F. Supp. 2d at 279 (noting that "courts do not routinely issue orders compelling preservation" in FOIA cases, given the existing legal prohibitions against document and destruction, especially where "there is no indication that the [agency] has or will destroy any records related to th[e] request").

Plaintiff's primary argument in favor of a preservation order appears to be that FBI Director James Comey was terminated on May 9, 2017 and that it is thus "conceivable that records that were under his control have already been altered or destroyed." Pl.'s Mot. ¶ 21.² As an initial

² Plaintiff did not raise the specter of seeking a preservation order in this case until it "did not receive any records or responses from the FBI regarding category 4 of [its] FOIA Request on or before May 11, 2017, as directed by this Court in the April 10, 2017, Order." Pl.'s Mot. ¶ 11. Even if Plaintiff were correct in suggesting that it was entitled to receive these records on May 11 – as opposed to having the FBI produce them on that date – Plaintiff admits that it received electronic copies of all relevant records the following day. *Id.* ¶ 12. Plaintiff cannot credibly contend that this alleged delay – which caused Plaintiff no harm, irreparable or otherwise, and is in no way indicative of a failure to preserve documents – justifies a preservation order. Rather, it is clear that the alleged delay was used as a pretext to seek an unnecessary preservation order based on Plaintiff's speculative conclusions regarding the "firing of Director Comey." *Id.* ¶ 13.

matter, Plaintiff is incorrect to argue that it can show “irreparable harm” simply because the loss of responsive records would be irreparable. *Id.* ¶ 25. To obtain a preservation order, the requesting party must demonstrate not only that the destruction of records would constitute irreparable harm, but also that there is a sufficient likelihood of such destruction absent a court order. *See Landmark Legal Fdn. v. EPA*, 910 F. Supp. 2d at 279 (noting that “the mere ‘potential of destruction’ is not sufficient to demonstrate the need for [a preservation] order”); *Pueblo of Laguna*, 60 Fed. Cl. at 138 (“[T]he proponent ordinarily must show that absent a court order, there is significant risk that relevant evidence will be lost or destroyed[.]”); *Capricorn Power Co.*, 220 F.R.D. at 434 (“[I]n the absence of any significant past, present or future threat to the continuing integrity or existence of the evidence, such an order is superfluous.”).

Here, Plaintiff has made no such showing. Its contention that the firing of the FBI Director has caused the FBI to abandon its normal document retention practices, ignore its legal obligations, and destroy records of an ongoing investigation, is rank speculation (either by Plaintiff or individuals quoted in news articles). Indeed, it is directly refuted by the congressional testimony of the Acting Director of the FBI, Andrew McCabe, which Plaintiff itself discusses in its motion. But while Plaintiff cites the following exchange for the proposition that the “precise concern” of document retention was raised at a recent Senate Intelligence Committee hearing, Pl.’s Mot. ¶ 23, Plaintiff, remarkably, omits Acting Director McCabe’s answer in which he gave Congress an explicit assurance that any information or evidence Director Comey may have had related to the investigation into Russian interference had been secured and retained:

Senator Harris: Who was in charge of securing [Director Comey’s] files and devices when that – when that information came down that he had been fired?

Acting Director McCabe: That’s our responsibility, ma’am.

Senator Harris: And are you confident that his files and his devices have been secured in a way that we can maintain whatever information or evidence he has in connection with the investigation?

Acting Director McCabe: *Yes, ma'am. I am.*

*Open Hearing on Worldwide Threats Before the U.S. Senate Select Committee on Intelligence, 115th Cong. (May 11, 2017) (exchange between Senator Kamala Harris and Acting FBI Director Andrew McCabe at 02:20:00-02:20:20) (emphasis added).*³

In addition, undersigned counsel has confirmed to counsel for the Plaintiff that the FBI is preserving all documents potentially responsive to Plaintiff's FOIA request in accordance with its normal document retention procedures and that it has no reason to believe that any such documents are being destroyed. Plaintiff has offered no reason for this Court to disregard either these assurances or the assurances of Acting Director McCabe that the FBI is complying with its legal obligations to preserve the documents at issue in Plaintiff's motion, and accordingly cannot overcome the presumption of regularity that attaches to the FBI's document retention procedures. *See Hines v. United States*, 658 F Supp. 2d 139, 144 (D.C. Cir. 2009) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have discharged their official duties." (citations omitted)).

In fact, Plaintiff has not come forward with any actual evidence that any FBI records have been destroyed or altered in any way. Nor has it made a credible showing that the records will be destroyed in the future. This case is unlike other recent cases in which courts in this District have issued preservation orders immediately prior to the change in administration based upon concerns that public officials would not preserve emails on their personal email accounts upon leaving

³ Available at <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-hearing-0>.

public service. See Preservation Order, *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, Civil Action No. 16-967 (RDM) (Jan. 18, 2017), ECF No. 24; Minute Order, *Judicial Watch, Inc. v. U.S. Dep't of Justice*, Civil Action No. 17-cv-29 (EGS) (Jan. 17, 2017). Plaintiff's reliance on speculative assertions that records could have "conceivabl[y]" been destroyed, Pl.'s Mot. ¶ 21, is insufficient for it to carry its burden of demonstrating irreparable harm and the need for a preservation order. See *Capricorn*, 220 F.R.D. at 435 ("[W]here the need expressed by the moving party for a preservation order is based upon an indefinite or unspecified possibility of the loss or destruction of evidence, rather than a specific, significant, eminent threat of loss, a preservation order usually will not be justified."); *Landmark Legal Found.*, 910 F. Supp. 2d at 279 ("[T]he mere 'potential of destruction' is not sufficient to demonstrate the need for [a preservation] order."); *It's A 10, Inc. v. Beauty Elite Grp., Inc.*, 932 F. Supp. 2d 1325, 1335 (S.D. Fla. 2013).⁴

CONCLUSION

For these reasons, Plaintiff's Motion to Compel Preservation is unfounded and unnecessary and should be denied.

Dated: May 19, 2017

Respectfully submitted,

CHAD A. READLER

⁴ Even if Plaintiff were somehow entitled to a superfluous preservation order requiring the FBI to preserve records it was already obligated to preserve (without any evidence that the records were nonetheless being destroyed), the relief it seeks is overbroad. This is a FOIA matter pursuant to which Plaintiff seeks to compel the production of records responsive to its FOIA request. It is not additionally entitled to "all records related to this litigation," or "all records related to the subject matter of [its] request." Any records that are not responsive to Plaintiff's FOIA request are beyond the scope of this litigation and not properly subject to any preservation order this Court could enter in this case. See *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008) (granting mandamus relief and reversing a district court's order to preserve hard drives by forensic imaging as an abuse of discretion on the grounds that, among other reasons, "nothing in the record indicates that defendants are unwilling, or will refuse, to preserve and produce all relevant ESI in the future," and after acknowledging that "the media at issue will almost certainly contain confidential state or private personal information that is wholly unrelated to the litigation").

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, a copy of the foregoing pleading was filed electronically via the Court's ECF system which sent notification of such filing to counsel of record.

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