

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

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**ELECTRONIC PRIVACY  
INFORMATION CENTER**  
**1718 Connecticut Avenue, N.W.**  
**Suite 200**  
**Washington, D.C. 20009,**

**Plaintiff,**

**v.**

**FEDERAL BUREAU OF  
INVESTIGATION**  
**935 Pennsylvania Ave. NW**  
**Washington, DC 20535**

**Defendant.**

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**Civil Action No. 17-121**

**PLAINTIFF’S REPLY IN SUPPORT OF MOTION TO COMPEL PRESERVATION**

The FBI does not dispute that there is a need to preserve records related to this litigation. In fact, the FBI does not even dispute three of the four factors that would support the issuance of a preservation motion. The FBI puts all of its chips on the remarkable contention that there is no risk of irreparable harm if the order EPIC seeks is not granted. The FBI dismisses EPIC’s motion for the preservation order as “rank speculation” even though a U.S. Senator raised precisely EPIC’s concern about record destruction following the dismissal of the FBI Director. Several members of Congress wrote with great urgency to the Department of Justice proposing specific procedures, including that the records be secure from access by the Attorney General. They, too, are concerned that the records concerning Russian interference could be altered or destroyed. Ignoring all the facts set out in EPIC’s motion concerning the abrupt dismissal of the agency head and the statements of the President, the FBI contends that EPIC has offered “no reason” to

disregard the assurances provided by the agency. Remarkably, the Bureau even suggests that the failure to “come forward with any actual evidence that any FBI records have been destroyed or altered in any way” militates against a preservation order. The order, of course, is intended to prevent precisely the outcome that the FBI puts forward as a reason to postpone action on this motion. The Court should grant EPIC’s motion to compel preservation.

Both parties agree that the FBI is under a legal obligation to preserve and to produce records responsive to the EPIC FOIA request. Pl.’s Mot. 8; Def.’s Opp’n 4. If the FBI is complying with these responsibilities, then EPIC will necessarily “prevail on the merits” of the FOIA claim and the agency could not suffer any harm or prejudice from entry of this order. The FBI does not dispute that there is a public interest in preserving the records that EPIC has identified. Therefore, three of the four factors that court consider when reviewing a motion to preserve records favor EPIC. *See Competitive Enter. Inst. v. Office of Sci. and Tech. Policy*, No. 14-cv-765, slip. op. at 4 (D.D.C. Dec. 12, 2016) (quoting *Citizens for Responsibility and Ethics in Wash. v. Office of Admin.*, 593 F. Supp. 2d 156, 159 (D.D.C. 2009)). *See also Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 279–280 (D.D.C. 2012). EPIC arguably should prevail on these grounds alone.<sup>1</sup>

Contrary to the FBI’s claims, EPIC clearly established a substantial risk of irreparable harm. The FBI’s assertion that a preservation order would not be necessary *in this particular case* ignores entirely the recent developments in the agency that bear on EPIC’s request. Both parties agree that the law requires the FBI to preserve records that “are the subject of a pending

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<sup>1</sup> Traditionally “the four factors should be 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.” Pl.’s Mot. ¶ 15 (quoting *Competitive Enter. Inst.*, slip op. at 5). However, even if the Court requires each factor to be established independently, EPIC should prevail because all four factors favor preservation. *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (deferring resolution on how to evaluate the factors).

request, appeal, or lawsuit under the FOIA.” Pl.’s Mot. 8. But at this stage of the litigation, the agency has not yet produced or even provided a description of all records responsive to EPIC’s FOIA request. EPIC has not yet had an opportunity to review and potentially challenge the sufficiency of the agency’s search and, therefore, has had no opportunity to address the scope of records that “are the subject of” the request.

Contrary to the FBI’s assertion, EPIC’s motion is necessary to preserve the status quo by preventing the destruction of any documents that could potentially be found to be “the subject” of the request at a later stage in the litigation. The FBI’s must produce all non-exempt records responsive to category 1 of the FOIA request or otherwise respond to that portion of the request by July 25, 2017 – two months from the date of filing of this reply. At this stage, the Agency’s search for records may not have been completed, and EPIC has not had the opportunity to evaluate the FBI’s search. Accordingly, EPIC seeks preservation of all records potentially responsive to the FOIA request: “(1) all records responsive to EPIC'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 Mot. 9. Against the risk irreparable harm cited by EPIC, EPIC contends “it is better to be safe than sorry.” *Competitive Enter. Inst. v. Office of Sci. and Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016)).

The FBI contends that EPIC must provide “actual evidence” that FBI records “have been destroyed.” Def.’s Opp’n 7. This mischaracterizes EPIC’s burden. It would make little sense to require the movant for a preservation order to prove that the records at issue had already been destroyed. Rather EPIC is required to show “a likelihood for the need of an order compelling

preservation,” – a “danger” that the records “might [be] destroy[ed].” *Landmark*, 910 F. Supp. 2d at 279-280.

In *Landmark*, this Court rejected a motion for a preservation order where the movant offered only two facts in support: 1) a sanction nearly ten years prior against the EPA for destroying records potentially responsive to the movant’s FOIA request in a separate FOIA case, and 2) a single news article indicating the EPA Office of Inspector General was investigating records management practices at the EPA. *Landmark*, 910 F. Supp. 2d at 279-80. These facts were insufficient to establish the need for an order compelling preservation. Still, the Court in *Landmark* stressed that while it “cannot base a decision to compel preservation on a single news article . . . as developments occur, it may reconsider the necessity of an order compelling preservation of records.” *Id.* at 280.

In contrast, EPIC has presented numerous facts *directly* bearing on the risk that the records concerning the Russian interference with the 2016 election may not be preserved: the extraordinary firing of the FBI director, numerous questions about the security of the FBI investigative files raised by national security experts, and concerns expressed by Members of Congress about the alteration or destruction of these records also immediately following the firing of the FBI Director. Pl.’s Mot. 1-8. The FBI entirely fails to engage these facts.

Since the filing of this motion two weeks ago, the evidence in support of a preservation order has only increased. Contemporaneous notes from the former FBI Director reportedly outline the President’s request that Mr. Comey “let . . . go” of the investigation into former National Adviser Michael Flynn. Michael S. Schmidt, *Comey Memo Says Trump Asked Him to*

*End Flynn Investigation*, N.Y. Times (May 16, 2017).<sup>2</sup> President Trump told Russian officials that firing FBI director Comey relieved “great pressure” from the Russian investigation. Matt Apuzzo, Maggie Haberman, & Matthew Rosenberg, *Trump Told Russians That Firing ‘Nut Job’ Comey Eased Pressure from Investigation*, N.Y. Times (May 19, 2017).<sup>3</sup> It is hard to imagine a more significant threat to the integrity of agency records in a FOIA matter.

In *Landmark*, this Court found that there was “no indication” that the agency would destroy records subjects to a FOIA request. In the matter currently before this Court, there is widespread concern that the records are at risk. In *Landmark*, this Court observed “a possibility for destruction of records exists with regard to any FOIA request, yet courts do not routinely issue orders compelling preservation.” *Landmark*, 910 F. Supp. 2d at 279. EPIC agrees, and having litigated dozens of FOIA cases in the D.C. Circuit over 25 years, notes that this is the first time it has ever moved for a preservation order. This case presents unique circumstances. And the assurances that the agency provided the requester in *Landmark* that led this Court to conclude that there “seems little likelihood for the need of an order compelling preservation” are more than outweighed by the firing of the FBI Director, the concerns of Congress, and the statements by the President.

For these reasons, EPIC respectfully requests the Court enter the Order to Compel Preservation. Pl.’s Mot. 9.

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<sup>2</sup> <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>.

<sup>3</sup> <https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html>.

Respectfully Submitted,

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