

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

**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.

Civil Action No. 17-121

MOTION TO COMPEL PRESERVATION

1. Plaintiff Electronic Privacy Information Center (“EPIC”) moves for an Order to Compel Defendant Federal Bureau of Investigation (“FBI”) to preserve all agency records responsive to or related to this Freedom of Information Act (“FOIA”) case. Pursuant to Local Rule 7(m), undersigned counsel has conferred with the FBI, through counsel, and the FBI has indicated that it opposes this motion.

BACKGROUND

2. On Dec. 22, 2016, EPIC submitted a FOIA request (“the EPIC FOIA request”) to the FBI for records concerning the Russian interference with the 2016 Presidential Election. EPIC filed suit on January 18, 2017, after the FBI failed make a timely decision concerning EPIC’s request for expedited processing of the FOIA request.

3. On January 6, 2017, the Intelligence Community issued a public report in which it assessed that Russia sought to influence the outcome of the 2016 Presidential election. The FBI fully supported the assessment contained in the report. Office of the Dir. of Nat'l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* i-ii (2017) (“This report includes an analytic assessment drafted and coordinated among The Central Intelligence Agency (CIA), The Federal Bureau of Investigation (FBI), and The National Security Agency (NSA)... We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election.”).¹

4. On March 20, 2017, FBI Director James Comey testified that the Bureau was “investigating the nature of any links between individuals associated with the Trump campaign and the Russian government, and whether there was any coordination between the campaign and Russia’s efforts.” *Russian Election Interference*, C-Span (Mar. 20, 2017) (displaying House Select Intelligence Committee hearing on the Russian interference in the 2016 election).²

5. On April 10, 2017, this Court issued a scheduling order in response to the March 27, 2017, Joint Status Report. The Order set the schedule for proceedings in this matter, and required that “(1) The FBI shall produce all non-exempt records responsive to category 4 of Plaintiff’s FOIA request or otherwise respond to that portion of Plaintiff’s request by no later than May 11, 2017.”

6. On or about May 4, 2017, FBI Director James Comey met with Deputy Attorney General Rod Rosenstein to seek additional resources for the Russia investigation. Matthew Rosenberg &

¹ https://www.dni.gov/files/documents/ICA_2017_01.pdf.

² <https://www.c-span.org/video/?425087-1/fbi-director-says-hes-investigating-links-trump-campaign-russia&live&vod&start=3512>.

Matt Apuzzo, *Days Before Firing, Comey Asked for More Resources for Russia Inquiry*, N.Y. Times (May 20, 2017).³

7. On May 9, Deputy Attorney General Rod Rosenstein submitted a memo to the Attorney General in which he stated, “the FBI is unlikely to regain public and Congressional trust until it has a Director who understands the gravity of the mistakes and pledges never to repeat them.” Memorandum from Rod Rosenstein, Deputy Attorney Gen., on Restoring Public Confidence in the FBI (May 9, 2017) (Exhibit 1 at 6).

8. On May 9, 2017, President Donald Trump fired the FBI Director. *See* Letter from President Donald J. Trump to James Comey, Dir. of the Fed. Bureau of Investigation (May 9, 2017) (Exhibit 1 at 2).

9. On May 11, 2017, President Donald Trump told NBC’s Lester Holt, in a public interview, that the firing of Director Comey was related to the Russia investigation. He further stated that “regardless of the recommendation I was going to fire Comey And in fact when I decided to just do it, I said to myself, I said you know, this Russia thing with Trump and Russia is a made up story.” *Watch Lester Holt’s Extended Interview With President Trump*, NBC News (May 11, 2017).⁴

10. On May 12, 2017, President Donald Trump stated that “James Comey better hope that there are no "tapes" of our conversations before he starts leaking to the press!” @realDonaldTrump, Twitter (May 12, 2017, 5:26 AM).⁵

³ <https://www.nytimes.com/2017/05/10/us/politics/comey-russia-investigation-fbi.html>.

⁴ <http://www.nbcnews.com/nightly-news/video/pres-trump-s-extended-exclusive-interview-with-lester-holt-at-the-white-house-941854787582>.

⁵ <https://twitter.com/realDonaldTrump/status/863007411132649473>.

11. EPIC did not receive any records or responses from the FBI regarding category 4 of the EPIC FOIA Request on or before May 11, 2017 as directed by this Court in the April 10, 2017, Order.

12. On May 12, 2017, EPIC contacted opposing counsel and informed the FBI of EPIC's intent to file this motion, noting the agency's failure to produce responsive records to EPIC by May 11th. Opposing counsel responded, informing EPIC for the first time that the FBI sent responsive records to EPIC (via postal mail) on May 11th. Opposing counsel also attached electronic copies of those records.

13. The firing of Director Comey, combined with statements by the President, underscore the substantial risk that the records EPIC seeks concerning the FBI's investigation of the Russian interference with the 2016 Presidential election will not be preserved. Moreover, because EPIC ultimately seeks public release of the records pursuant to the FOIA, a failure by the FBI to preserve the records sought will not be remediable after the fact.

14. For these and other reasons described in detail below, EPIC meets this Court's standard for granting a Preservation Order. EPIC respectfully requests the Court issue an Order requiring the FBI to preserve all records responsive to and related to the EPIC FOIA Request.

**ALL FOUR CONSIDERATIONS FOR PRELIMINARY INJUNCTIVE RELIEF WEIGH
IN FAVOR OF GRANTING A PRESERVATION ORDER**

Standard of Review

15. To determining whether a preservation order is warranted, this Court considers "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Court grants the stay; and (4) the public interest in granting the stay." *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)). “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.” *Id.* at 5 (citations omitted).

16. All four factors weigh in favor of granting EPIC’s Motion for a Preservation Order in this case.

1. Likelihood of Success on the Merits

17. This factor “ordinarily” weighs in favor of the Order where “the plaintiff has raised questions going to the merits” which are “fair ground for litigation and thus more deliberative investigation.” *Id.* at 6 (quoting *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).

18. EPIC has raised substantial legal questions about the FBI’s compliance with the FOIA. As EPIC stated in the complaint, the FBI failed to timely respond to EPIC’s request for expedited processing, failed to grant EPIC’s request for expedited processing, and is unlawfully withholding agency records. ECF No. 1 ¶¶ 32-40.

2. Risk of Irreparable Harm

19. EPIC risks “irreparable harm” unless the Preservation Order is entered because there is substantial risk of destruction of these records and, if the records are not preserved, the Plaintiff will have no adequate remedy.

20. There were substantial concerns that records concerning the Russian interference with the 2016 Presidential election would not be preserved prior to the filing of EPIC’s FOIA lawsuit. Following the election, officials in the White House and the Intelligence Community were concerned that “intelligence could be covered up or destroyed” after the transfer of power.

Matthew Rosenberg, Adam Goldman, & Michael S. Schmidt, *Obama Administration Rushed to Preserve Intelligence of Russian Election Hacking*, N.Y. Times (Mar. 1, 2017).⁶ Intelligence officials sought to “spread information . . . to leave a clear trail of intelligence for investigators.” *Id.* According to the New York Times, “Mr. Trump’s statements stoked fears among some that intelligence could be covered up or destroyed — or its sources exposed — once power changed hands.” *Id.*

21. The firing this week of FBI Director James Comey, the person in charge of the agency in possession of the files sought by EPIC, has significantly increased the risk of irreparable harm to EPIC. Director Comey was leading the FBI’s investigation of the Russian interference, including an investigation of whether there was collusion or coordination between members of the Trump campaign and the Russians. *Russian Election Interference*, C-Span (Mar. 20, 2017) (displaying video of Director Comey testimony at March 20, 2017 hearing before the House Select Intelligence Committee on the Russian interference).⁷ The firing of Mr. Comey was unprecedented; only one other FBI Director has been dismissed in U.S. history, and then only after a lengthy investigation and well substantiated ethics violations. Phillip Bump, *Here’s How Unusual It Is for an FBI Director to Be Fired*, Wash. Post (May 9, 2017)⁸ Moreover, Mr. Comey was also fired while traveling across the country, away from the FBI headquarters and his personal files. Richard Winton & James Queally, *Comey Was ‘Caught Flat-footed’ and Learned of Firing From TV While Talking to FBI Agents in L.A., Source Says*, L.A. Times (May 9,

⁶ <https://www.nytimes.com/2017/03/01/us/politics/obama-trump-russia-election-hacking.html>.

⁷ <https://www.c-span.org/video/?425087-1/fbi-director-says-hes-investigating-links-trump-campaign-russia>.

⁸ https://www.washingtonpost.com/news/politics/wp/2017/05/09/heres-how-unusual-it-is-for-an-fbi-director-to-be-fired/?utm_term=.7f919cf09080.

2017).⁹ It is conceivable that records that were under his control have already been altered or destroyed.

22. Indeed, Members of the House Judiciary Committee wrote directly to the Department of Justice and FBI on May 9, stating “it is imperative that you take several immediate steps to protect the integrity of your investigations into Russian efforts to influence our recent election and related matters.” House Committee on the Judiciary, *Top House Judiciary Democrats Call on DOJ & FBI to Preserve Russia Investigation Documents & Materials Related to Comey Firing* (May 9, 2017).¹⁰ The letter further stated, “First, we ask that any and all files, documents, memoranda and other materials involving the Department’s and FBI’s criminal investigation into matters related to Russian interference in our federal elections; collusion with individuals associated with the Trump campaign; and associated matters be preserved and placed off limits to any and all White House officials and staff and any other individuals, including Attorney General Sessions, who have recused themselves from the investigation.” *Id.*

23. Senator Kamala Harris also raised this precise concern at the Senate Intelligence Committee hearing this week. Senator Harris asked Acting FBI Director Andrew McCabe: “Are you confident that [former Director Comey’s] files have been secured in a way that we can maintain whatever information or evidence he has in connection with the [Russian] investigation?” *Hearings*, U.S. Senate Select Committee on Intelligence (including video therein of open Committee “World Wide Threats” on May 11, 2017).¹¹

24. Experts in national security law have also raised concerns about the preservation of the files. Julian Sanchez of the Cato Institute wrote on May 10, 2017. “That Trump chose to send

⁹ <http://www.latimes.com/local/lanow/la-me-comey-los-angeles-20170509-story.html>.

¹⁰ <https://democrats-judiciary.house.gov/news/press-releases/top-house-judiciary-democrats-call-doj-fbi-preserve-russia-investigation>.

¹¹ <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-hearing-0>.

Comey his pink slip in Los Angeles, with no warning, ought to at least prompt some inquiries into whether both his own files and those of the investigation remain secure.” Julian Sanchez, *Some Obvious thoughts About the Comey Firing*, Just Security (May 10, 2017).¹²

25. Further, if the FBI fails to preserve the records at issue in this case, EPIC will have no adequate remedy. EPIC ultimately seeks the public release of FBI records concerning the Russian interference. Any attempt to cure the FBI’s failure to preserve after the fact will necessarily fall short. This risk clearly rises to the level of irreparable harm.

3. Whether Others Will Be Harmed by the Preservation Order

26. Because the Preservation Order would ensure FBI compliance with existing legal obligations, no harm will result from granting the instant injunction. Further, the order would be consistent with the DOJ FOIA regulation, which require that “[r]ecords shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA” (28 CFR §16.9). Likewise, the Federal Records Act requires federal agencies to create and preserve government records. 44 U.S.C. §§ 3101 et seq.

4. Public Interest

27. The public interest weighs heavily in favor of granting an order to preserve the FBI Records. “FOIA’s central purpose [is] exposing to public scrutiny official information that sheds light on an agency’s performance of its statutory duties.” *Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 750 (1989). *See also Ctr. to Prevent Handgun Violence v. Dep’t of Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999) (“There is public benefit in the release of information that adds to citizens’ knowledge.”).

28. The public interest is served by ensuring the records at issue are preserved while the parties proceed pursuant to the April 10, 2017, Court Order. *See, e.g., Citizens for Responsibility*

¹² <https://www.justsecurity.org/40770/obvious-thoughts-comey-firing/>.

and Ethics in Wash., 593 F. Supp. 2d at 165 (“[T]he public interest certainly favors ensuring that OA's records are preserved while the D.C. Circuit considers CREW’s expedited appeal.”).

CONCLUSION

29. Because all four factors weigh in favor of granting Plaintiff’s Motion Order, Plaintiff respectfully requests the Court enter an Order requiring the FBI to preserve (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.

Respectfully Submitted,

/s/ Alan Butler

Alan Butler, D.C. Bar # 1012128
EPIC Senior Counsel

Marc Rotenberg, D.C. Bar # 422825
EPIC President and Executive Director

ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)

Dated: May 12, 2017