

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

**JUDICIAL WATCH, INC.**

**Plaintiff,**

**v.**

**U.S. DEPARTMENT OF STATE,**

**Defendant.**

**Civil Action No. 1:12-cv-2034  
(RBW)**

**DEFENDANT’S OBJECTIONS TO PLAINTIFF’S  
PROPOSED PRESERVATION ORDER**

Pursuant to the Court’s Order dated September 3, 2015, Defendant Department of State (“Department”) hereby responds to Plaintiff’s proposed preservation order. The Department objects to the issuance of any preservation order as unnecessary because, as explained below, former Secretary Clinton has already turned over approximately 55,000 pages of work-related and potentially work-related documents to the Department, and the Department has already taken numerous steps to ensure the preservation of these documents.<sup>1</sup> The Department has also taken similar steps with other former employees who used non-state.gov accounts. The Department further objects to the proposed preservation order because this Court lacks jurisdiction over personal records, which by definition are not agency records under the Freedom of Information Act (“FOIA”).

---

<sup>1</sup> State received 53,988 pages of documents consisting of emails and attachments to emails from former Secretary Clinton. In consultation with the National Archives and Records Administration, State identified approximately 1,533 pages of those documents as entirely personal correspondence, that is, documents that are not federal records and thus that are not subject to the FOIA, leaving a total of approximately 52,455 pages remaining to be reviewed and released.

In support of its objections to Plaintiff's proposed preservation order, the Department states as follows:

1. This FOIA case involves a targeted request for "all records concerning, regarding, or relating to the advertisement produced by the U.S. embassy in Islamabad, entitled 'A Message from the President of the United States Barack Obama and Secretary of State Hillary Clinton' intended to air in Pakistan." Complaint ¶ 5 (ECF No. 1). The parties settled this lawsuit in November 2014, after the Department searched all components reasonably expected to have responsive records, including the Office of the Secretary and the Bureau of Public Affairs; produced 700 pages of records; and submitted a 27-page draft Vaughn to Plaintiff. *See* Joint Status Report September 8, 2015 (ECF No. 17). The parties jointly agreed to re-open this case in May 2015. (ECF No. 21). Former Secretary Clinton has provided the Department with approximately 55,000 pages of emails from her non-"state.gov" account, and the Department is currently processing those documents for public release in accordance with a production schedule set forth in *Leopold v. Department of State*, Civil Action No. 15-123 (RC).

2. Despite the limited scope of the FOIA request at issue, Plaintiff seeks a broad preservation order asking the Court to order the Department to take:

all reasonable steps to determine whether copies of clintonemail.com documents and data from 2009-2013 (excluding data already returned to the Defendant) exist anywhere separate and apart from the clintonemail.com Server, and if they exist, to ensure they are preserved. These contents include, but are not limited to: the 31,380 reportedly withheld hdr22@clintonemail.com records; any emails associated with Huma Abedin's clintonemail.com account; and any other emails or documents of any other current or former government employee or official during the relevant time period.

Plaintiff's proposed preservation order is overbroad and unnecessary, and, as written, the Court lacks jurisdiction to enter it.

3. **First**, Plaintiff readily concedes that its requested preservation order is designed to target personal email. Indeed, Plaintiff asserts that its proposed order is necessary because, “neither former Secretary Clinton nor Mr. Kendall believes they are under a current obligation to preserve records they deem personal.” See Plaintiff’s Notice of Filing Proposed Preservation Order, para. 2 (ECF No. 26). But there is no legal basis in the FOIA for requesters to obtain employees’ personal records and, therefore, there is no legal basis for the Court to order the State Department to preserve, or to take steps to preserve, the personal records of the former Secretary or any other current or former federal employee.

a. This Court lacks jurisdiction to issue an order targeting personal emails because those documents are not “agency records” subject to the FOIA. 5 U.S.C. §552(a)(4)(B); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (“federal jurisdiction is dependent upon a showing that an agency has (1) ‘improperly’ (2) ‘withheld’ (3) ‘agency records’”); *Competitive Enterprise Inst. v. NASA*, 989 F. Supp. 2d 74, 85 (D.D.C. 2013) (5 U.S.C. § 552(a)(4)(B) provides jurisdiction to “enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld”). Plaintiff seeks to order the Department to locate copies (if they exist) and preserve the “31, 380 reportedly *withheld* [hdr22@clintonemail.com](mailto:hdr22@clintonemail.com) records.”<sup>2</sup> (emphasis added) As Plaintiff admits, the former Secretary and her counsel determined that these documents are personal records and therefore did not produce them to the Department. Thus, those documents are not in the State Department’s possession, custody or control to be subject to the FOIA. *Kissinger*, 445 U.S. at 150-51, 155; see also *Nat’l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990)(“[T]he

---

<sup>2</sup> The State Department does not know the exact number of “withheld” documents, and Plaintiff has provided no evidentiary support for this number.

agency must have ‘possession or control’ over a document before it may be deemed to be ‘withholding’ it.”). Moreover, even if the Department had custody of them, personal records are not subject to the FOIA. 5 U.S.C. §552(a)(4)(B); *Kissinger*, 445 U.S. at 150; *see also Fortson v. Harvey*, 407 F. Supp. 2d 13, 15 (D.D.C. 2005) (“Federal district courts cannot compel an agency to disclose documents, unless those documents constitute ‘agency records’ under FOIA”); 36 C.F.R. § 1220.18 (“Personal files are excluded from the definition of Federal records and are not owned by the Government”).

b. The cases that plaintiff cited during the September 3, 2015 status conference do not hold otherwise. In both cases, the records at issue were agency records, and plaintiffs in those cases neither sought preservation nor production of personal records. *See Chambers v. Dept of Interior*, 568 F.3d 998 (D.C. Cir. 2009) (reversing grant of summary judgment due to material issue of fact on whether agency intentionally destroyed employee’s performance appraisal after it was requested under the FOIA); *Ryan v. Dept. of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (holding that FOIA exemption 5 applied to an agency record submitted by outside consultants as part of the deliberative process, and solicited by the agency).

c. There is no question that former Secretary Clinton had authority to delete personal emails without agency supervision – she appropriately could have done so even if she were working on a government server. Under policies issue both by the National Archives and Records Administration (“NARA”) and the State Department, individual officers and employees are permitted and expected to exercise judgment to determine what constitutes a federal record. *See* NARA Bulletin 2014-06 ¶4 (Sept. 15, 2014) (“Currently, in many agencies, employees manage their own email accounts and apply their own understanding of Federal records management. This means that all employees are required to

review each message, identify its value, and either delete it or move it to a recordkeeping system.”);<sup>3</sup> Department of State Foreign Affairs Manual, 5 FAM 443.2(b) (“[t]he intention of this guidance is not to require the preservation of every E-mail message.”) (attached as Ex. 1)

The purpose of these policies is to direct the preservation of those messages that contain information that is necessary to ensure that “departmental policies, programs, and activities are adequately documented. E-mail message creators and recipients must decide whether a particular message is appropriate for preservation. In making these decisions, all personnel should exercise the same judgment they use when determining whether to retain and file paper records.” *Id.*<sup>4</sup> A federal record is defined by statute as including “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.” 44 U.S.C. § 3301. The regulations define personal files as “documentary materials belonging to an individual that are not used to conduct agency business. Personal files are excluded from the definition of Federal records and are not owned by the Government.” 36 C.F.R. § 1220.18. Moreover, the regulations further specify that “[n]on-record materials should be purged when no longer needed for reference. NARA's approval is not required to destroy such materials.” 36 C.F.R. §1222.16(b)(3).

4. **Second**, because personal records are not subject to FOIA, and State Department employees may delete messages they deem in their own discretion to be personal, Plaintiff’s

---

<sup>3</sup> <http://www.archives.gov/records-mgmt/bulletins/2014/2014-06.html>

<sup>4</sup> In October, 2104, the Department further clarified this guidance. (attached as Ex. 2).

preservation argument reduces to an unsupported allegation that former Secretary Clinton might have mistakenly or intentionally deleted responsive agency records rather than personal records. But Plaintiff offers no support for such a theory, and government agencies are not required to take steps to recover deleted material based on unfounded speculation that responsive information had been deleted. Indeed, in the absence of information to believe that information was in deleted in bad faith after a FOIA request was received, an agency is under no requirement to take steps to recover removed or deleted information. *McGehee v. CIA*, 697 F.2d 1095, 1103 n. 33 (D.C.Cir.1983); *accord Chambers, supra*.

Here, there is no reasonable basis to believe that any agency records responsive to this request were deleted, let alone in bad faith, and Plaintiff has cited none. The evidence, if anything, demonstrates that the former Secretary's production was over-inclusive, not under-inclusive. The Department's review, of the approximately 55,000 pages of documents provided to the Department determined that at least 1246 of the emails provided were not federal records. *See* Letters dated August 12, 2015 and August 21, 2015 from David Kendall, Esq. to Under Secretary Kennedy (attached as Exs. 3 and 4). Additionally, the records requested pursuant to this FOIA request involve an officially sanctioned State Department public service advertisement produced for audiences in Pakistan. Plaintiff has not offered any reason why former Secretary Clinton would have deleted records related to a public service advertisement in Pakistan, a subject on which the Department has already produced 700 documents.

5. **Third**, Plaintiff's proposed preservation order is completely unnecessary because of the numerous steps the government has taken to date to make sure that all federal records – the only legitimate subject of inquiry under FOIA -- are being preserved. As the attached documents demonstrate, former Secretary Clinton directed her attorneys to identify all

documents that were work-related and potentially work-related and to provide those documents to the Department. The Department has received approximately 55,000 pages of emails from former Secretary Clinton, and has also received federal records from several other former employees who at times used non-state.gov accounts. To date the following actions and/or steps have been taken to preserve all of these documents:

**a.** In November 2014, the Department sent a letter to former secretaries of state, including former Secretary Clinton, requesting that if former Secretaries or their representatives were “aware or [were to] become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department. . . if there is reason to believe that it may not otherwise be preserved in the Department’s recordkeeping system.” (attached as Ex. 5).

**b.** In December 2014, former Secretary Clinton’s representative responded to the above-referenced letter and provided to the Department paper copies of approximately 30,000 e-mails, comprising approximately 55,000 pages. (attached as Ex. 6).

**c.** In *Judicial Watch v. State*, Civ. Action No. 15-688 (RC), Counsel for the Department of Justice, referring to the documents provided to the Department by former Secretary Clinton stated on the record that “the government will preserve every record in its possession that relates to this and all other requests.” Transcript of July 9, 2015 Status Conference at 15-16 (attached as Ex. 7).

**d.** On August 8, 2015, former Secretary Clinton declared under penalty of perjury, “I have directed that all my e-mails on clintonemail.com in my custody that were or potentially were federal records be provided to the Department of State, and on information

and belief, this has been done.” See Declaration of Hillary Rodham Clinton dated August 8, 2015. (attached as Ex. 8).

e. On August 10, 2015, pursuant to Court order in *Judicial Watch v. State*, Civil Action No. 13-cv-1363 (EGS), the Department sent another letter to former Secretary Clinton, through her attorney, specifically requesting that she not delete any federal records, electronic or otherwise, in her possession or control, and provide appropriate assurances to the Government that she will not delete any such documents. (attached as Ex. 9).

f. On August 14, 2015, also in *Judicial Watch v. State*, Civil Action No. 13-cv-1363 (EGS), Mr. John Hackett, Director of the Office of Information Programs and Services submitted a declaration stating “the Department is not currently aware of any personal computing devices issued by the Department to former Secretary Clinton, Ms. Abedin, or Ms. Mills that may contain responsive records” to the FOIA requests at issue in that case. See Hackett Decl. at ¶8 (attached as Ex. 10).

6. **Fourth**, the Department objects to specific statements in plaintiff’s proposed order as follows:

a. First paragraph, first sentence: “certain contents of the clintonemail.com server (the “Server”) from the years 2009-2013 have apparently not been provided to the Defendant.” Objection: No basis exists to believe that documents responsive to this FOIA request have not been provided to the Department, and Plaintiff has provided none.

b. First paragraph, second sentence: “The Defendant has not confirmed to Plaintiff or the Court whether copies of these records still exist and will be preserved throughout the pendency of this litigation.” Objection: The Department has confirmed



on numerous occasions that all agency records returned to the Department will be preserved. In addition, the Department has issued instructions to former Secretary Clinton and other former officials not to delete federal records. An order requiring preservation of personal emails is not appropriate, for the reasons explained above.

c. Second paragraph: Objection: For all the reasons set forth above, a preservation order is neither necessary nor appropriate. The “questions of law” identified by Plaintiff are not at issue in this case, which involves a narrow FOIA request and a search of federal records in the Department’s possession.

d. Third paragraph, first sentence: “the Defendants shall take all reasonable steps to determine whether copies of clintonemail.com documents and data from 2009-2013 (excluding data already returned to the Defendant) exist anywhere separate and apart from the clintonemail.com Server, and if they exist, to ensure they are preserved. These contents include . . . any other emails or documents of any other current or former government employee or official during the relevant time period.” Objection: This language is overbroad, as it purports to include personal, non-agency records as well as the emails of family members who did not work at the Department of State and whose records are not subject to this FOIA request.

e. Fourth paragraph: Objection: this paragraph is improper, as the Court lacks jurisdiction over non-agency records, and former Secretary Clinton and her lawyer have already responded to requests for information regarding the return of agency records.

\* \* \*

In sum, the Department has taken all reasonable and required steps to ensure that the federal records of former Secretary Clinton and other former employees have been

returned to the government and are being preserved. Plaintiff has provided no evidence that the records that former Secretary Clinton and her counsel “withheld” as personal were in fact, federal records. Nor is there any reason to believe that any of these records are responsive to the narrow FOIA request at issue here.

Accordingly, no preservation order is necessary and the Court should reject Plaintiff Judicial Watch’s proposed preservation order in its entirety. To the extent the Court wants specific assurances regarding the preservation of federal records in the Department’s possession that may be responsive to the specific FOIA request in this case, the Department attaches a Proposed Order at Ex. 11.

Date: September 9, 2015

Respectfully submitted,

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney  
General

ELIZABETH SHAPRIO  
Deputy Branch Director

/s/ Marsha Stelson Edney  
Marsha Stelson Edney(D.C. Bar No. 41427)  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W.  
Washington, DC 20530  
Tel: (202) 514-4520  
Marsha.edney@usdoj.gov

*Counsel for Defendant*