

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE)
1310 L Street NW, 7th Floor)
Washington, D.C. 20005)

Plaintiff,)

v.)

Civil Action No. 1:21-cv-1238-CKK

JOHN PODESTA, in his capacity as chair)
of the National Climate Task Force,)
and the NATIONAL)
CLIMATE TASK FORCE)
1600 Pennsylvania Avenue NW)
Washington, D.C. 20500;)

OFFICE OF THE SECRETARY)
OF COMMERCE)
1401 Constitution Avenue NW)
Washington, D.C. 20230;)

OFFICE OF THE ADMINISTRATOR)
OF THE ENVIRONMENTAL PROTECTION)
AGENCY)
1200 Pennsylvania Avenue NW)
Washington, D.C. 20460;)

THE U.S DEPARTMENT OF HOUSING)
AND URBAN DEVELOPMENT)
451 7th Street, SW)
Washington, D.C. 20410;)

THE U.S. DEPARTMENT OF)
TRANSPORTATION)
1200 New Jersey Ave.)
Washington, D.C. 20590;)

THE U.S. DEPARTMENT OF ENERGY)
1000 Independence Ave., SW)
Washington, D.C. 20585;)

THE GENERAL SERVICES)
ADMINISTRATION)
1800 F Street, NW)

WASHINGTON, D.C. 20006;)
)
 THE OFFICE OF MANAGEMENT)
 AND BUDGET)
 1650 Pennsylvania Avenue, NW)
 Washington, D.C. 20502;)
)
 THE OFFICE OF SCIENCE AND)
 TECHNOLOGY POLICY,)
 725 17th Street, NW,)
 Washington, D.C. 20500;)
)
 THE U.S. DEPARTMENT OF)
 THE TREASURY,)
 1500 Pennsylvania Avenue, NW)
 Washington, D.C. 20220;)
)
 THE U.S. DEPARTMENT OF DEFENSE)
 1000 Defense, Pentagon)
 Washington, D.C. 20301;)
)
 THE U.S. DEPARTMENT OF JUSTICE)
 950 Pennsylvania Avenue, NW)
 Washington, D.C. 20530;)
)
 THE U.S. DEPARTMENT OF LABOR)
 200 Constitution Avenue, NW)
 Washington, D.C. 20210;)
)
 THE U.S. DEPARTMENT OF)
 HEALTH AND HUMAN SERVICES,)
 200 Independence Avenue, SW)
 Washington, D.C. 20201;)
)
 THE U.S. DEPARTMENT OF)
 OF HOMELAND SECURITY,)
 2707 Martin Luther King Jr. Avenue, SE)
 Washington, DC 20528,)
)
 Defendants.)

**PLAINTIFF’S MOTION TO COMPEL PRESERVATION OF GINA MCCARTHY’S
 RECORDS RELEVANT TO PLAINTIFF’S FOIA REQUESTS**

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INTRODUCTION

Plaintiff Competitive Enterprise Institute (“CEI”) requests an order directing Defendants to preserve all agency records relevant to CEI’s requests for production under the Freedom of Information Act. *See* ECF No. 16.¹ Since CEI filed its Supplemental Complaint in October 2021, Defendant Gina McCarthy, the chairwoman of the National Climate Task Force, announced her decision to step down from public office effective September 16, 2022. *See President Biden Announces Senior Clean Energy and Climate Team*, THE WHITE HOUSE (Sept. 2, 2022), <https://bit.ly/3rptzhC>. Ms. McCarthy’s departure increases the likelihood of loss or destruction of records relevant to CEI’s FOIA requests. The loss of such records would result in irreparable harm to CEI’s statutory right to obtain records responsive to CEI’s FOIA requests. *See generally* 5 U.S.C. § 552. And the loss of such records would undermine the public’s interest in knowing what policymaking the Task Force has carried out under Ms. McCarthy’s leadership. CEI requests expedited consideration of this preservation motion given the imminent risk of loss or destruction of relevant records.²

FACTUAL AND PROCEDURAL BACKGROUND

In early 2021, the President through an Executive Order established the National Climate Task Force. *See Tackling the Climate Crisis at Home and Abroad*, Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). The President’s Executive Order directs the Task Force to “facilitate the organization and deployment of a Government-wide approach to combat the climate crisis.” *Id.* at 7623. It also instructs the Task Force to “facilitate planning and implementation of

¹ The case caption has been changed to reflect Ms. McCarthy’s departure from public office. *See* Fed. R. Civ. P. 25(d).

² In conformity with Local Rule 7(m), CEI has discussed the motion to preserve with opposing counsel. Defendants oppose the motion.

key Federal actions to reduce climate pollution.” *Id.* To carry out its sweeping mandate, the Task Force has been authorized to exercise substantial authority to implement one of the most far-reaching redirections of government policy in decades. *See generally id.*

From day one, the Task Force has wielded its broad authority under the leadership of the newly created post of National Climate Advisor. *Id.* at 7622. The President named Gina McCarthy, a former Administrator of the Environmental Protection Agency, as the first ever National Climate Advisor. *See Office of Domestic Climate Policy*, THE WHITE HOUSE, <https://bit.ly/3SAgDBr>. In her leadership role as National Climate Advisor, Ms. McCarthy coordinated policymaking among executive agencies on domestic climate issues and convened several Task Force meetings as chairwoman of the Task Force. *See* ECF No. 20 at 7–9; *see* 86 Fed. Reg. at 7623.

The Task Force has worked doggedly under Ms. McCarthy toward implementing the President’s sweeping mandate to deliver “environmental justice.” *See* 86 Fed. Reg. at 7623. The Task Force has developed a national greenhouse-gas emissions goal and has a national climate strategy in the works. *See* ECF No. 21 at 7. The President himself has characterized the Task Force’s agenda under Ms. McCarthy as “the most aggressive action ever, from historic legislation to bold executive actions, to confront the climate crisis head-on.” *President Biden Announces Senior Clean Energy and Climate Team*, THE WHITE HOUSE (Sept. 2, 2022), <https://bit.ly/3CtTAM6>. But this Administration has shrouded in secrecy most information about the Task Force and its undertakings. *See id.* The public remains in the dark about how Ms. McCarthy managed the role as National Climate Advisor and how the Task Force conducted its affairs under her leadership.

Given Ms. McCarthy's substantial role in coordinating the Task Force's policy agenda, CEI sent a FOIA requests to the Task Force and Ms. McCarthy, seeking copies of certain documents related to the activities of Task Force. *See* ECF No. 16. Neither Ms. McCarthy nor the Task Force responded to CEI's FOIA requests. So CEI filed a complaint alleging that Defendants Ms. McCarthy, the National Climate Task Force, the Office of the Secretary of Commerce, the Office of the Administrator of the Environmental Protection Agency, and a host of other agencies failed to respond in compliance with FOIA. *See* ECF No. 1; *see also* ECF No. 7 (Amended Complaint). Rather than respond to CEI's amended complaint with the production of the requested documents in compliance with federal law, the government filed a partial dismissal on the theory that neither Ms. McCarthy nor the Task Force qualify as an "agency" within the meaning of FOIA. *See* ECF No. 12. In July 2021, CEI filed a Supplemental Complaint. *See* ECF No. 16. On October 28, 2021, the government renewed its motion to dismiss. *See* ECF No. 20. The government's motion remains pending.

In early September 2022, almost a year after the government filed its partial motion to dismiss, the White House announced that Ms. McCarthy would step down from her position as the National Climate Advisor effective September 16, 2022. *See President Biden Announces Senior Clean Energy and Climate Team*, THE WHITE HOUSE (Sept. 2, 2022), <https://bit.ly/3rptzhC>. Ms. McCarthy's departure increases the likelihood of loss or destruction of records relevant to CEI's FOIA requests. The loss of such records would result in irreparable harm to CEI's statutory right to obtain records responsive to CEI's FOIA requests. *See generally* 5 U.S.C. § 552. The loss of responsive records would also undermine the public's interest in knowing what policymaking the Task Force carried out under Ms. McCarthy's leadership. CEI requests an order from this Court directing Defendants to preserve all of Ms. McCarthy's records relevant to CEI's requests for

production under FOIA. This Court should also instruct Ms. McCarthy to cooperate with Defendants, preserve all responsive records, and attest to whether all records relevant to CEI's FOIA requests have been preserved.

STANDARD OF REVIEW

Federal courts possess the inherent authority to order the preservation of information relevant to pending claims and defenses. *See, e.g., Dietz v. Bouldin*, 579 U.S. 40, 45 (2016); *Armstrong v. Exec. Off. of President*, 823 F. Supp. 4, 5–6 (D.D.C. 1993). Yet no binding authority instructs district courts on what standard governs a party's motion to preserve records responsive to a FOIA request. *See United States ex rel. Stagers v. Medtronic, Inc.*, 2022 WL 4078969 at *4 (D.D.C. Sept. 6, 2022) (applying multiple tests given doctrinal uncertainty); *O.K. v. Bush*, 2005 WL 8177541 at *1 (D.D.C. Oct. 27, 2005). Federal courts have applied at least three different tests to resolve a motion to preserve. *See Deggs v. Fives Bronx, Inc.*, 2020 WL 3100023 at *2 (M.D. La. June 11, 2020); *El-Banna v. Bush*, 2005 WL 1903561 at *1 n.3 (D.D.C. July 18, 2005) (remarking that the different tests may have little to no practical difference).

In this jurisdiction, federal courts have often relied on the standard four-factor test employed in the injunctive relief context. *See Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y*, 2016 WL 10676292 at *2 (D.D.C. Dec. 12, 2016) (“A Motion to Compel Preservation is subject to the same analytical framework as a motion for injunctive relief.”); *Cause of Action Inst. v. U.S. Dept. of Just.*, 2019 WL 12070403 at *1 (D.D.C. Apr. 25, 2019) (same). Under that four-factor test, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 721 (D.C. Cir. 2022) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)). District courts

often employ a sliding scale when evaluating the four factors, permitting a party to compensate for a lesser showing on one factor with a stronger showing on another factor. *See Gomez v. Kelly*, 237 F. Supp. 3d 13, 14 (D.D.C. 2017). *But see Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (suggesting that “the old sliding-scale approach to preliminary injunctions—under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa—is no longer controlling, or even viable,” but instead that “a party moving for a preliminary injunction must meet four independent requirements” (citation omitted)); *see also Adirondack Transit Lines, Inc. v. Greyhound Lines, Inc.*, 2022 WL 2452597 at *4 (D.D.C. July 1, 2022) (unpacking the confusion on whether district courts should still use the sliding scale approach). The moving party bears the burden of showing that the four factors favor relief. *See Creaghan v. Austin*, 2022 WL 1500544 at *4 (D.D.C. May 12, 2022).

ARGUMENT

Each of the four factors weigh in favor of granting CEI’s motion. The public, including CEI, has a right to obtain all of Ms. McCarthy’s non-exempt relevant records. *See Knight First Amend. Inst. at Columbia Univ. v. Cent. Intel. Agency*, 11 F.4th 810, 813 (D.C. Cir. 2021). Ms. McCarthy’s departure from public office, however, casts serious doubt on whether all her records will remain in the custody of the federal government. *See Wadelton v. Dep’t of State*, 208 F. Supp. 3d 20, 28 (D.D.C. 2016) (noting that the federal government has a duty to preserve all responsive records). The likelihood that some if not a substantial portion of Ms. McCarthy’s records will be lost in the departure shuffle raises significant concerns about the breadth and thoroughness of Defendants’ search for responsive records. The public and CEI’s inability to review Ms. McCarthy’s relevant records in the event of their loss or destruction undermines the purpose of

FOIA and harms the public interest. *See U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 494 (1994) (noting that FOIA embodies “a general philosophy of full agency disclosure” (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–361 (1976))). This Court should grant CEI’s motion to preserve and order Defendants to search for and preserve copies of Ms. McCarthy’s relevant records, including emails and related documents, to ensure full compliance with FOIA. This Court should also instruct Ms. McCarthy to cooperate with other Defendants, preserve all relevant records, and attest to whether all records have been preserved. *See Citizens for Resp. & Ethics in Washington v. Off. of Admin.*, 565 F. Supp. 2d 23, 24 (D.D.C. 2008).

I. CEI Has Raised A “Serious Legal Question” As To The Adequacy Of Defendants’ Search And Defendants’ Retention Of All Relevant Records.

A movant must show a likelihood of success on the merits to warrant a preservation order. *See Church v. Biden*, 573 F. Supp. 3d 118, 133 (D.D.C. 2021). To make that showing, a plaintiff “need not establish an absolute certainty of success.” *Booth v. Bowser*, 2022 WL 823068 at *8 (D.D.C. Mar. 18, 2022) (quoting *Pop. Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986)). Rather, a plaintiff need only raise “questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). In the context of a motion to preserve, the crucial consideration is whether the plaintiff has raised a “serious legal question” as to the adequacy of the defendant’s search or the defendant’s retention of all responsive records. *Cause of Action Inst.*, 2019 WL 12070403 at *1; *United States ex rel. Staggars*, 2022 WL 4078969 at *6.

Here, Ms. McCarthy’s sudden departure from her position as National Climate Advisor and the chairwoman of the Task Force raises a serious legal question about whether Defendants have retained all records relevant to CEI’s FOIA requests. *See* 5 U.S.C. § 552(a)(3); *DiBacco v.*

U.S. Army, 795 F.3d 178, 183 (D.C. Cir. 2015) (noting that FOIA requires “federal agencies to make their records available to the public upon request” (citation omitted)). Ms. McCarthy’s departure from her post makes it more difficult for Defendants to comply with their obligation to conduct a reasonable search for all responsive records. *See Oglesby v. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Ms. McCarthy likely possesses agency records relevant to CEI’s FOIA requests found nowhere else. And if Ms. McCarthy possesses agency records on personal devices, those records must be saved. *See Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. U.S. Dep’t of Just.*, 377 F. Supp. 3d 428, 436 (S.D.N.Y. 2019) (“The use of private email accounts to conduct official business has become commonplace. Mobile electronic devices and communication platforms have proliferated, and the boundaries between home and office, and personal and business travel, have blurred. Reports of public officials using personal accounts or devices to conduct official business and, at times, to evade disclosure regulations have become the subjects of public discourse.” (citation omitted)); *Wright v. Admin. for Children & Families*, 2016 WL 5922293 at *8 (D.D.C. Oct. 11, 2016) (“[E]mployees communications on non-agency accounts may constitute ‘agency records’ subject to the FOIA.”). Defendants have no way of controlling Ms. McCarthy or the records in her sole possession since her departure from public office. *See Cause of Action Inst.*, 2019 WL 12070403 at *1 (noting the uncertainty over what obligations a former government official must preserve records). And Ms. McCarthy may not be familiar with the intricacies of what constitutes an “agency record” compared to a “personal record” for purposes of FOIA. *See Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006) (“[O]ur circuit has adopted a totality of the circumstances test to distinguish ‘agency records’ from

personal records.”). The lack of familiarity with the intricacies of FOIA heightens the likelihood that relevant records will be lost or destroyed in the wake of Ms. McCarthy’s departure.

The failure to search for and preserve Ms. McCarthy’s records would pose another serious legal question: whether that failure violates the Federal Records Act. *See* 44 U.S.C. § 2101 *et seq.* The Federal Records Act “governs the creation, management and disposal of federal records.” *Armstrong v. Bush*, 924 F.2d 282, 284 (D.C. Cir. 1991). The Act requires agencies to create “standards and procedures” to ensure “[a]ccurate and complete documentation of the policies and transactions of the Federal Government.” 44 U.S.C. § 2902(1). The Act also requires agency heads to “establish and maintain a[] . . . program for the . . . management of the records of the agency,” *id.* § 3102, and mandates that the agency “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency,” *id.* § 3101. No records may be “alienated or destroyed” unless done so pursuant to the dictates of the Act. *Armstrong*, 924 F.2d at 285 (citation omitted); 44 U.S.C. § 3301(a)(1)(A) (defining records); *Democracy Forward Found. v. Pompeo*, 474 F. Supp. 3d 138, 143 (D.D.C. 2020) (“The Federal Records Act requires agencies to ‘make and preserve records containing adequate and proper documentation’ of the agencies’ activities and to establish records management programs to ensure proper maintenance of federal records.” (quoting 44 U.S.C. §§ 3101, 3102(1))). Were this Court to determine that Ms. McCarthy and the Task Force qualify as an agency for purposes of FOIA, it would extend coverage of the Federal Records Act to both Defendants. *See Armstrong v. Exec. Off. of the President*, 90 F.3d 553, 556 (D.C. Cir. 1996) (noting that “the coverage of the FRA is coextensive with the definition of ‘agency’ in the FOIA” (citation omitted)); *Citizens for Resp. & Ethics in Washington v. Off. of Admin.*, 559 F. Supp. 2d 9, 18 (D.D.C. 2008), *aff’d*, 566 F.3d 219 (D.C. Cir. 2009). This Court

therefore should grant the motion to preserve to ensure that Defendants remain in compliance with the Federal Records Act.

The circumstances surrounding CEI's FOIA requests also tip the scales in favor of granting CEI's motion to preserve. *See Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979) (“[T]he competence of any records-search is a matter dependent upon the circumstances of the case.”). Not only has Ms. McCarthy departed public office, but CEI's FOIA requests to the Task Force has been pending for over nineteen months. *See* ECF No. 16. That time lapse coupled with Ms. McCarthy's departure increases the likelihood that relevant records will be misplaced and lost forever. *See Minkovski v. United States Dep't of Treasury*, 384 F. Supp. 3d 244, 253 (E.D.N.Y. 2019). Now that Ms. McCarthy no longer needs to keep records for employment purposes, and given that she disputes the application of FOIA to her records, Ms. McCarthy may harbor the false belief that she need not preserve relevant records. All these considerations taken together lead to the natural conclusion that CEI has raised a serious legal question as the adequacy of Defendants' search and Defendants' retention of all responsive records.

The risk of spoliation further supports CEI's motion to preserve. Federal courts possess the “inherent powers” to sanction parties, including federal agencies, for the spoliation of responsive records. *See Landmark Legal Found. v. Env't Prot. Agency*, 82 F. Supp. 3d 211, 218 (D.D.C. 2015); *see also* Fed. R. Civ. P. 37 (requiring parties to preserve material evidence or face the risk of sanctions). A federal agency that fails to preserve responsive records “runs the risk of being justly accused of spoliation—defined as the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Landmark Legal Found.*, 82 F. Supp. at 219 (quoting *Clarke v. Wash. Metro. Area*

Transit Auth., 904 F.Supp.2d 11, 20 (D.D.C. 2012)); *see also 4DD Holdings, LLC v. United States*, 143 Fed. Cl. 118, 121 (2019) (granting a motion to sanction a federal agency for failing to preserve records). This Court may consider the risk of spoliation when considering whether to grant CEI's motion to preserve. *See Vasser v. Shulkin*, 2017 WL 5634860 at *5 n.6 (D.D.C. Nov. 22, 2017). And this Court should grant CEI's motion to preserve to head off the risk that this Court will need to impose sanctions down the line. Indeed, this Court will have little choice but to impose sanctions if it turns out that Defendants failed to adhere to their duty to preserve all records responsive to this litigation, which further supports this motion to preserve.

This Court should also discount any forthcoming assurances from Defendants that they will preserve Ms. McCarthy's relevant records despite her departure from public office. An assurance "does not have the force of an order." *Citizens For Resp. And Ethics In Washington v. Off. of Admin.*, 593 F. Supp. 2d 156, 162 (D.D.C. 2009) (quoting *Citizens for Resp. & Ethics in Washington*, 565 F. Supp. 2d at 30)). Even presuming Defendants have acted in good faith, CEI and this Court would have no recourse if relevant records go unpreserved "absent a court order punishable by contempt requiring the maintenance and preservation of the records." *Citizens For Resp. And Ethics In Washington*, 593 F. Supp. at 162. A court order requiring Defendants to maintain the records at issue guards against the "grave harm" CEI would have face if Ms. McCarthy failed to preserve all relevant records. *Id.* at 163.

II. CEI And The Public Face The Risk Of Irreparable Harm Absent A Preservation Order.

CEI will likely suffer irreparable harm if the Court denies its motion to preserve. *See Banks v. Booth*, 459 F. Supp. 3d 143, 158 (D.D.C. 2020); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 2021 WL 2036662 (D.D.C. May 21, 2021). Courts consider several principles when deciding whether an alleged harm counts as likely irreparable. First, a plaintiff must show a "clear

and present need for equitable relief” based on the imminence of the “complained-of” injury. *Dallas Safari Club v. Bernhardt*, 453 F. Supp. 3d 391, 398 (D.D.C. 2020) (citation omitted). Second, the plaintiff must substantiate the imminence of the “complained-of” injury. *Id.* And third, the plaintiff must establish a causal link between the “complained-of” injury and the requested relief. *Id.*

CEI would suffer irreparable harm if the records relevant to the FOIA requests go unpreserved. CEI has a “clear and present” need for a motion to preserve given Ms. McCarthy’s sudden departure from public office and the likelihood that Ms. McCarthy possesses records relevant to CEI’s FOIA requests. The loss or destruction of records relevant to CEI’s FOIA requests “would result in irreparable harm because, once [lost or] destroyed, the evidence” is no more. *Deggs*, 2020 WL 3100023 at *6. The imminence of the potential loss or destruction of relevant records is likewise clear, as Ms. McCarthy’s departure calls into question the adequacy of Defendants’ search for and retention of all relevant records. And this Court ordering Defendants to preserve Ms. McCarthy’s records would dissipate the potential injury to CEI and the public. These considerations demonstrate that CEI and the public face the risk of irreparable harm absent a preservation order.

III. A Balancing Of The Harms And The Consideration Of The Public Interest Favor A Preservation Order.

The third and fourth factors call “for assessing the harm to the opposing party and weighing the public interest.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors merge “when the government is the opposing party” because the government’s interest is the public interest. *Id.* Under the merged factors, courts balance the equities to decide the amount of harm the plaintiff would face if the motion went ungranted compared to the harm the government would face if the

motion were granted. *See Pursuing Am. 's Greatness v. Fed. Election Comm 'n*, 831 F.3d 500, 511 (D.C. Cir. 2016).

Here, the burden of ordering Defendants to preserve all relevant records is minimal and the public interest “favors the preservation of official records.” *Cause of Action Inst.*, 2019 WL 12070403 at *2. Federal law requires Defendants to preserve all records for FOIA purposes. *See Wadelton*, 208 F. Supp. 3d at 28. The public, CEI included, has a substantial interest “in having governmental agencies abide by the federal laws that govern their existence and operations.” *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). The loss or destruction of Ms. McCarthy’s relevant records would harm democratic interests, as FOIA helps facilitate an “informed citizenry,” which is “vital to the function of a democratic society.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citation omitted); *Morley v. C.I.A.*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (“Congress enacted FOIA to ‘pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.’” (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976))). The public interest thus favors ensuring that Ms. McCarthy’s records are preserved while this Court resolves this case.

IV. CEI’s Motion To Preserve Succeeds Under Either Of The Two Alternative Tests.

Recall that federal courts have applied at least three different tests to decide whether to grant a motion to preserve. *See Deggs*, 2020 WL 3100023 at *2. CEI’s motion to preserve succeeds even if this Court were to apply a test other than the four-factor test used for obtaining injunctive relief. *See Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006) (discussing

the various tests); *Matthews v. Exec. Off. for United States Att'ys*, 2020 WL 10354076 at *2 (W.D. Tex. Oct. 6, 2020) (determining that the “Plaintiff has satisfied both tests”).

First, CEI’s motion to preserve succeeds under the alternative two-part balancing test. *See Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 137 (2004). That test requires the moving party to show that (1) “absent a court order, there is significant risk that relevant evidence will be lost or destroyed” and (2) “the steps to preserve the evidence will be effective, but not overbroad.” *United States ex rel. Staggers*, 2022 WL 4078969 at *4 (citation omitted). Here, Ms. McCarthy’s departure from public office creates a “significant risk” that relevant records will be lost or destroyed. Ms. McCarthy’s exit from her post also increases the difficulty for Defendants to comply with their obligation to conduct a reasonable search for all relevant records because some records likely remain in Ms. McCarthy’s sole possession. In addition, a preservation order asking Defendants to maintain all of Ms. McCarthy’s records would be effective and not overboard. Indeed, Defendants have a statutory obligation to preserve Ms. McCarthy’s relevant records under FOIA. *See generally Heffernan v. Azar*, 317 F. Supp. 3d 94, 103 (D.D.C. 2018).

Second, CEI’s motion to preserve also succeeds under the alternative three-part balancing test. *See Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433 (W.D. Pa. 2004). That test balances three factors:

- 1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence;
- 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and
- 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence’s original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Id. at 433–34. CEI has serious concerns that Defendants will fail to preserve Ms. McCarthy’s relevant records given the turnover at the Task Force. Ms. McCarthy’s departure from public

office poses a serious risk that records relevant to CEI's FOIA requests will be lost in the shuffle. The misplacement or destruction of Ms. McCarthy's records would cause irreparable harm to CEI as well as the public. CEI and the public have a right to know what policymaking the Task Force has undertaken as well as the procedures Ms. McCarthy has implemented to accomplish the Task Force's sweeping mandate. What's more, compliance with a preservation order would impose limited burdens on the Defendants. Defendants have a statutory obligation to turn over records relevant to CEI's FOIA requests. Requiring Defendants to preserve Ms. McCarthy's records imposes little to no burden but rather ensures compliance with federal law. *See United States ex rel. Staggars*, 2022 WL 4078969 at *5.

V. Should This Court Decide That Neither McCarthy Nor The Task Force Qualify As An Agency For Purposes Of FOIA, This Court Should Enter A Simultaneous Order Requiring Defendants Preserve All Relevant Records.

This would not be the first time that this Court has required a defendant to preserve all records relevant to a plaintiff's FOIA requests while plaintiff appealed this Court's order. In *Citizens For Responsibility And Ethics In Washington v. Office of Administration*, this Court granted plaintiff's motion to preserve all records while it appealed this Court's order dismissing plaintiff's lawsuit under FOIA on the basis that the defendant did not qualify as an agency within the meaning of FOIA. 593 F. Supp. 2d at 159. This Court reasoned that "maintaining the status quo is appropriate [because] a serious legal question is present, . . . little if any harm will befall other interested persons or the public and . . . denial of the order would inflict irreparable harm on the movant." *Id.* (quoting *Citizens for Resp. & Ethics in Washington*, 565 F. Supp. 2d at 31). That same reasoning applies here. First, CEI present serious legal questions as to whether Ms. McCarthy and the Task Force qualify as an agency for purposes of FOIA and whether Defendants have retained all relevant records. Second, little harm will befall Defendants if this Court forces them to maintain records relevant to CEI's FOIA requests. Third, if on appeal, the D.C. Circuit

were to conclude that Ms. McCarthy and the Task Force qualify as an agency for purposes of FOIA, Defendants would become entitled to all their disclosable records. The public interest thus favors ensuring that Defendants relevant records remain preserved while the Court of Appeals considered CEI's expedited appeal. In sum, this Court should issue a simultaneous order requiring Defendants preserve all relevant records were this Court to rule in favor of Defendants' partial motion to dismiss CEI's Supplemental Complaint.

CONCLUSION

For the foregoing reasons, CEI respectfully requests that this Court grant the motion to preserve, ordering Defendants to search for and preserve copies of Ms. McCarthy's records, including emails and related documents, responsive to CEI's FOIA requests or otherwise relevant to this lawsuit. This Court should also instruct Ms. McCarthy to cooperate with Defendants, preserve all relevant records, and attest to whether all records responsive to CEI's FOIA requests or relevant to this case have been preserved.

Respectfully submitted this 6th day of October 2022,

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