IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY ARCHIVE,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 07-1577 (HKK/JMF)**
EXECUTIVE OFFICE OF THE PRESIDENT, *et al.*,	)	**(Consolidated with Civil Action No. 07-1707 (HKK/JMF))**
Defendants.	)	

PLAINTIFF NATIONAL SECURITY ARCHIVE'S REPLY ON MARCH 18, 2008 ORDER TO SHOW CAUSE

After being ordered to show cause why Defendant EOP should not be ordered to create and preserve a forensic copy of media used between March 2003 and October 2005 (through an affidavit describing the costs and any other facts that would bear on any burden of preserving the same), Defendant EOP failed to provide the Court with any of the facts it requested. Instead, Defendant EOP has balked at the Court's Show Cause Order, providing only conclusory statements regarding cost and burden, without the factual proof necessary to support a discharge of the Order. The lack of EOP evidence alone requires the conclusion that it has not shown cause and that the Order should issue. Its dearth of proof coupled with the additional revelations of harm in Theresa Payton's Second Declaration — that the EOP has destroyed hard drives from the relevant period, does not monitor or track its own hardware, and has no guidelines in place for the retention or preservation of other media devices — further affirm the need for this Court to extend the preservation order to protect these sources of media that the EOP itself has chosen to callously neglect.

Notwithstanding the above, Plaintiff National Security Archive (the "Archive"), with this Response, seeks to provide the Court with factual evidence regarding the actual cost and burden of forensic copying. As the accompanying declaration establishes, leaps in forensic copying and imaging technology have rendered nominal the cost and burden of preserving media of the type envisioned by the Court. Thus, the minimal costs and burdens to Defendant EOP do not come close to outweighing the likelihood that the obliteration of data — from which the missing emails may be reconstructed — will result in irreparable harm to Plaintiffs. Plaintiff National Security Archive therefore requests that this Court enter an order requiring Defendant EOP to copy or image workstations and to preserve other external media.[1]

ARGUMENT

I. THE COST AND BURDEN OF FORENSIC COPYING IS NOMINAL COMPARED TO THE LIKELIHOOD THAT EMAIL DATA WILL BE OBLITERATED

In its Response to March 18, 2008 Order to Show Cause ("EOP Response") [07-1707 Docket # 64-1] (Mar. 21, 2008), Defendant EOP did not provide the Court with any factual proof to support its allegations that preserving email data by copying or imaging workstations would be so costly and burdensome as to outweigh the risk. For example, EOP did not provide the Court with basic facts such as the number of workstations at EOP or the number of workstations per component, the estimated number of hours per workstation to copy or image, or the estimated cost per workstation. Furthermore, Defendant EOP did not provide the Court with other facts, such as the result of a spot-check or random sampling, to support its allegations that copying or imaging of workstations would be fruitless. Instead, EOP makes only conclusory allegations — such as "significant time and cost burdens," EOP Response at 2-4, and "hundreds

[1] The Archive still seeks depositions in aid of an extension of the Preservation Order. Courts have ordered such depositions in similar instances to ascertain the nature of government information systems. *Alexander v. FBI*, 188 F.R.D. 111, 118-19 (D.D.C. 1998) (Lamberth, J.).

of hours of work," Second Payton Decl. ¶ 10 — without a shred of factual support. EOP's Second Declaration appears to be based solely on guesswork and conjecture, rather than upon informed inquiry. Therefore, and as discussed further below, EOP's allegations of cost and burden should be ignored in their entirety.

Rather than leave the record completely vacant in this regard, Plaintiff Archive provides the Court with the factual support it seeks regarding the type of email data that is likely to reside on individual workstations at EOP, as well as the cost and time associated with copying and preserving this data. As described below and in the accompanying Declaration of Al Lakhani ("Lakhani Decl."), the relative costs and burdens to Defendant EOP of copying this data are minimal compared to the likelihood that such copying will protect data not otherwise found on EOPs backup tapes.

A. If Forensic Copying/Imaging is Not Ordered, There is a High Likelihood that Email Data will be Obliterated

As the accompanying Declaration of Al Lakhani provides, it is likely that all emails sent or received between March 2003 and October 2005 are not on the backup tapes.[2] Lakhani Decl. ¶¶ 5-14. Furthermore, it is likely that emails missing from the backup tapes can be found on workstations and other external storage devices. Lakhani Decl. ¶¶ 15-19.[3]

B. The Cost of Forensic Copying or Imaging is Nominal

As further provided in the Lakhani Declaration, the costs associated with copying or imaging these other sources of missing emails is not only quantifiable, but is also nominal.

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[2] It is also apparent, *see* Lakhani Decl. ¶ 13, that EOP's message-level method of archiving does not preserve all sender, recipient, and other information, such as workgroup distribution lists, which agencies are required to preserve under the FRA, as the Court of Appeals held in *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

[3] As the Lakhani Declaration explains, there are certain systematic mechanisms by which Defendants could have increased the probability that all emails would be preserved. Despite having four opportunities to allege that they have enabled these mechanisms (in two Declarations by Ms. Payton, and her written and oral testimony before Congress), it is clear that they have not been enabled.

Lakhani Decl. ¶¶ 20-26. If necessary, the Court can further reduce these costs to Defendant EOP by ordering targeted copying or imaging, such as the copying or imaging of workstations retired between March 2003 and October 2005, or only the copying and imaging of the workstations and media devices of high level officials within EOP.[4]

C. Defendant's Representations of Cost and Burden are Without Factual Support and Must Thus be Ignored

This Court ordered EOP to "show cause . . . why it should not be ordered to create and preserve a forensic copy of any media" at issue, and stated that showing cause means "describing the costs that would be incurred and any other facts that would bear on the burden of such an obligation." Order at 3 [07-1707 Docket #62] (Mar. 18, 2008). Yet EOP responds that "costs cannot be quantified at this time," and that if "the Court were to order defendants to obtain such cost data . . . defendants require and respectfully request additional time to submit requests for proposal and obtain cost estimate from third-party vendors." EOP Response at 2 n.1. But the Court *already* ordered that EOP's "response *must* include an affidavit describing the costs that would be incurred," Order at 3, and yet Theresa Payton's Second Declaration fails to address cost in anything other than the most conclusory terms, and makes no effort to provide the Court with even a numerical estimate. *See* Second Payton Decl. ¶ 7 ("what would likely be a lengthy and costly government procurement process"); *id.* ("The precise duration of the procurement process, as well as costs associated with that process, are not presently knowable, but they must be expected to be substantial . . .").[5]

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[4] For example, as the Lakhani Decl. provides, the cost of creating a forensic copy of one workstation is between $50 and $250 and takes less than a half an hour. Lakhani Decl. ¶ 25. Thus, the total cost and time to EOP of creating forensic copies of the workstations of the top 50 EOP employees determined to have emails from the relevant time period is $2,500 and 25 hours.

[5] *See also* Second Payton Decl. ¶ 7 ("significant burden"); *id.* ("what would likely be a lengthy and costly government procurement process"); *id.* (duration and cost of project "are not presently knowable, but they must be expected to be substantial"); *id.* ¶ 8 (even copying active data "can be complex and time consuming"); *id.* ¶ 10

EOP's bald assertions that costs cannot be quantified and are not presently knowable are disingenuous. First, the costs can be quantified; the Archive was able to quantify them. Second, EOP and OA have been able to provide detailed affidavits in the past attesting to the time and expense of conducting even more complicated procedures than the one at issue here. *See Alexander v. FBI*, 188 F.R.D. 111, 116-18 (D.D.C. 1998) (Lamberth, J.) (EOP and OA submitted two declarations describing in detail the cost and time likely to be incurred in order to restore back-up tapes and search for emails).

In ruling on a motion for injunctive relief, courts require "supporting documentation," not simply "a conclusory and empirically dubious proposition." *Columbia Hospital for Women Foundation v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F.Supp. 2d 1, 5 (D.D.C. 1997) (Kollar-Kotelly, J.). The Archive has demonstrated the risk that FRA-regulated emails will be obliterated. Even though this information is in the peculiar possession and control of Defendants, the Archive has supported its claims for relief with statements by different White House spokespersons and by Ms. Payton's various – and varying – sworn statements, and has demonstrated the magnitude of the injury it faces in its Complaint and the Declaration of Thomas Blanton. [07-1707 Docket # 42-2.]

Simply put, EOP has not articulated any specific facts that would allow the Court to weigh the asserted burden against the risk of irreparable harm to the Archive. Instead of answering the Court's questions, EOP merely argues that the Archive is seeking a mandatory injunction that would alter the status quo, and therefore must meet a higher burden by showing that it is "clearly" entitled to such relief. EOP Response at 3, 6-7. While the propriety of the

(continued...)

(copying active data "would require hundreds of hours of work by OCIO staff and management personnel" and would "divert significant resources").

Order contemplated by the Court has already been demonstrated, the Archive is not, in any event, subject to the stricter standard advocated by Defendants.

Defendant EOP's Stricter Standard Argument is Wrong

Defendants argue that because the Archive seeks injunctive relief, "the burden-benefit analysis of creating forensic copies should be more demanding than the analysis relevant to considering discovery demands." EOP Response at 6 n.4. They cite no authority for this proposition other than *Peskoff v. Faber*, 244 F.R.D. 54, 59 (D.D.C. 2007) (Facciola, J.), which says no such thing. *Peskoff* impliedly recognizes that EOP would certainly have a preservation obligation in the discovery context because, "[a] preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case," and because "a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." *Id.* at 60 (*citing Disability Rights Council of Greater Washington v. WMATA*, 242 F.R.D. 139, 146 (D.D.C. 2007) (Facciola, J.) (quoting Fed. R.Civ. P. 37, Advisory Committee Note (2006 amendments))). The United States is subject to the same preservation obligations as other litigants, and indeed, "while [it should] not enter[] into the calculus here, a good argument can be made that, as the enforcer of the laws, the United States should take this duty more seriously than any other litigant." *United Medical Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 274 (Fed. Cl. 2007) (Allegra, J.).

It is certainly *not* the case, as EOP argues, that its preservation obligation would somehow be *less* in this case, where the obligation flows directly from a statute, the FRA, and not from the Federal Rules, and where the records to be preserved are the very *res* around which the entire case centers, and not merely evidence of an alleged violation of duty. If anything, the

preservation expectation should be higher when the records at issue are the subject of the claim for relief, rather than discoverable evidence related thereto. Moreover, in a case of civil discovery, courts can at least fashion some remedies for spoliation of records, such as adverse inferences or even default judgments. But in this suit there are no alternative remedies to be had; if the records are destroyed, much of the case is mooted. That the Court has proposed a compromise solution that is less burdensome to Defendants does not somehow entitle them to impose a stricter burden on Plaintiff. And, in fact, it can be argued that the Defendant government is subject to a stricter preservation standard than that which it argues against.

The Order Contemplated By the Court Does Not Constitute a "Retrieval"

Defendants' argument that the Order contemplated by the Court amounts to a "retrieval" and therefore "exceeds the permissible scope of judicial relief under the FRA," EOP response at 4, is hardly new and not the least bit convincing; Defendants have advanced it elsewhere in this case, and other courts have rejected the notion that they cannot order preservation of the very records at issue in an FRA case pending adjudication on the merits. *See Citizens for Responsibility & Ethics in Washington v. DHS*, Civil Action No. 06-883, 2007 U.S. Dist. LEXIS 91901, at *30 n.15 (D.D.C. 2007) (Lamberth, J.) ("in some circumstances the Court may, temporarily, order an agency to preserve records until the Archivist is able to ensure that federal records are not destroyed."); *Armstrong v. Executive Office of President*, 810 F.Supp. 335, 349 (D.D.C. 1993) (Richey, J.) (enjoining defendants "from removing, deleting, or altering information on their electronic communications system until such time as the Archivist takes action . . . to prevent the destruction of federal records, including those records saved on backup tapes."); *aff'd.*, Armstrong *v. Executive Office of President*, 1 F.3d 1274, 1288 n.12 (D.C. Cir. 1993) ("Similarly unpersuasive is the appellants' argument that the district court should not have

enjoined the defendant agencies from destroying any electronic records until new guidelines were in place.").

Furthermore, the relief requested by the Archive – a halt to the destruction of all email data on all media – is clearly prohibitory in nature, and is not an affirmative, or mandatory, injunction. "The person named in a mandatory injunction must undo the wrong or injury with which he or she is charged," whereas a "prohibitory injunction requires a party to desist from doing certain acts in order to preserve the status quo." 42 Am. Ju. 2d Injunctions §§ 4, 5. It is well recognized that forensic copying is simply a means to ensure the prevention of the obliteration of files; it ensures preservation of the status quo. "'Preservation' is to be interpreted broadly," and "includes taking reasonable steps to prevent the partial or full destruction . . . of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible." *In re National Security Agency Telecommunications Records Litigation*, MDL Docket No. 06-1791 (VRW), 2007 WL 3306579, at *1 (N.D. Cal. 2007). If it would be unduly burdensome to preserve such material by quarantining it, preservation can be accomplished by "arrang[ing] for the preservation of complete and accurate duplicates or copies of such material." *Id.* at *2.

In issuing the Show Cause Order, the Court acknowledged that the purpose of forensic copying would be "[p]reserving whatever remains of this data," and that irreparable harm to the Plaintiff will occur if emails that are not in the archive or on back-ups are allowed to be obliterated. Order at 2-3 (citing Report and Recommendation [07-1707 Docket #11] (Oct. 19, 2007); *and Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998) (setting forth traditional standard for TRO and not requiring any heightened showing)). EOP has utterly failed

to articulate the nature or magnitude of the burden that it claims is so great as to bar preservation of the emails that form the subject matter of this suit.

II. EOP'S OTHER BURDEN ARGUMENTS ARE SIMILARLY UNSUPPORTABLE

A. The EOP Cannot Use a Lengthy Procurement Process as an Excuse

In addition to its unsupported allegations of in-house cost and labor, Defendant EOP makes unsupported allegations regarding the "lengthy and costly procurement process" associated with outsourcing the project to a third-party vendor. EOP Response at 2. However, as discussed below, Defendant EOP need not engage in any procurement process, let alone a "lengthy and costly" one. Given the circumstances, this Court may order Defendant EOP to "hire an independent computer forensics expert" or to confer with the adverse party to obtain a suitable expert. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 281 (E.D. Va. 2001); *Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007) (Facciola, J.) (ordering parties to collaborate with Court in issuing request for proposal seeking bids from qualified forensic computer technicians).[6]

B. The EOP Cannot Use its Practice of Recycling Hardware as an Excuse

Furthermore, EOP cannot get out of its preservation obligation by claiming that it has either destroyed hardware or is unable to track the user or location history of any given EOP

[6] Furthermore, as a factual matter, Defendant EOP fails to mention or take into account the Mega 3 contract it already has in place with three area vendors to perform this type of work at GSA rates, streamlining for it the procurement process should it be forced to invoke one. It has been reported that under this Mega 3, 6-year umbrella contract, the Department of Justice may submit task orders for services to be bid on by the three vendors. *See* Wilson P. Dizard, III, "Justice Taps 3 to vie for $950M in case management work," FEDERAL COMPUTER WEEK (June 19, 2007), *available at* http://www.fcw.com/online/news/103028-1.html (last visited Mar. 25, 2008) (attached as Exhibit A). The DOJ vendors are CACI International, Labat-Anderson Aspen Systems and Lockheed Martin, the first two of which have expertise in computer forensic services. *See* CACI International, Inc. Press Release, "CACI Awarded $48 Million Knowledge Management Task Order With Securities and Exchange Commission," (Sept. 25, 2007), *available at* http://www.caci.com/about/news/news2007/09_25_07_NR.html (last visited Mar. 25, 2008) (attached as Exhibit B) *and* Labat-Anderson Aspen Systems website, *available at* http://www.labat.com/litigation.htm (last visited Mar. 25, 2008) (attached as Exhibit C).

computer workstation.[7] Second Payton Decl. ¶ 6. As the Lakhani Declaration provides, however, industry best practices dictates the use of an asset tracing system, such as labeling each workstation with a barcode, to keep track of an organization's IT assets. Lakhani Decl. ¶¶ 19. Furthermore, the fact that EOP may have retired workstations between March 2003 and October 2005 underlines the need for those workstations to be located and preserved: a workstation retired during that time is more likely to have relevant data intact because the workstation has not been turned on or used since it was shelved. *See* Lakhani Decl. ¶ 18.

In any event, the Court should not take into account any burden claimed by EOP that is due solely to EOP's prior failure to preserve federal records and maintain an orderly information system.[8] As this Court has previously noted in the discovery context, "I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: 'that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.'" *Disability Rights Council*, 242 F.R.D. at 147 (footnote omitted).

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[7] Notably, EOP's assertion that it replaces one-third of its workstations each year and yet has no records from which it can easily determine the vintage of the computers suggests either that insufficient inquiry has been made by its declarant about EOP's computer replacement program or that there may still be many computers in use from the relevant period.

[8] In this case, the EOP has had knowledge that its email losses were a concern since at least as early as the criminal investigation in the Valerie Plame matter commenced and a litigation hold was put on EOP's recycling of backup tapes (on or around October 2003). Further, EOP officials have repeatedly been called to meet with congressional committee staff to address the state of their email losses. Moreover, this suit was commenced in September 2007 and counsel for each Plaintiff immediately brought preservation concerns to the attention of counsel for the Defendants. *See* Exhibits 2-5 to Memorandum in Support of Plaintiff's Motion for Leave to Serve Expedited Discovery Requests and to Compel Rule 26(f) Conference [07-1577 Docket #5] (Oct. 26, 2007) (referring to correspondence regarding preservation obligations).

III. THERE ARE ADDITIONAL EFFICIENT MEANS THAT SHOULD BE UNDERTAKEN TO PRESERVE THE DATA AT RISK

A. A Preservation Hold Should Be Placed on External Media Devices That May Contain Email Data

In a footnote to her Second Declaration, Ms. Payton states that with respect to that part of the Court's Show Cause Order that mentions hardware other than workstations,[9] the "OCIO does not have a formal process to provide such media to its customers or users, nor does it have any process in place for tracking or monitoring the use of such media." Second Payton Decl. ¶ 4 n.1. As this Court has already observed, individuals frequently save emails to such media devices. *See* Transcript of Hearing Before Magistrate Judge Facciola [07-1707 Docket #5-3] (Oct. 17, 2007) at 9:19-25, 10:2-11. That the OCIO chooses to turn a blind eye to the use of these devices by its employees does not relieve it of its obligation to preserve the evidence contained thereon. *See Disability Rights Council*, 242 F.R.D. at 147 (failure to make information readily accessible should not provide party with an automatic excuse to avoid producing it).

Furthermore, preserving the email data on these external media devices can be done with little burden or cost to OCIO. Ms. Payton's office can simply send a preservation memorandum to all EOP employees, asking them to search their offices for any external media device that may contain email data, to send such media devices to OCIO for preservation and storage, and to certify that they have done so. Should an employee have a continuing need for the external media, the cost of duplicating its contents is nominal.[10]

Similarly, EOP should query personnel about hard copies of emails. The common practice in many federal agencies with respect to retention of email continues to be printing and

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[9] Specifically, the Order defines "media" as "an 'object or device, such as a disc, tape, or other device, on which data is stored.'" Order at 3 (quoting THE SEDONA CONFERENCE GLOSSARY (2d ed.) at 23).

[10] *See* Lakhani Decl. ¶¶ 24-26.

saving hard copies of emails. To the extent this practice remains, those hard copy emails should likewise be searched for and preserved.

Thus, at the very least, OCIO should be ordered to search for and preserve hard copies of emails and external media devices that may contain emails.

B. OA Should Be Ordered to Remotely Query Workstations

Also in her Second Declaration, Ms. Payton states that the OCIO is able to remotely query computer workstations to determine information related to the time period in which the workstation was in use. Second Payton Decl. ¶ 6. Again, without any factual support for her allegations regarding cost and burden, Ms. Payton states that the process is "time consuming and labor intensive." *Id.* Again, at a minimum, Defendant EOP should be ordered to perform this remote query and create a forensic copy of any of the workstations determined to be in use at any time during the relevant period.

CONCLUSION

For the foregoing reasons, and those cited in Plaintiff National Security Archive's Emergency Motion to Extend TRO/Preservation Order and for Depositions, Defendant EOP should be ordered to copy or image workstations and other external media containing email data. A Proposed Order is attached.

Respectfully Submitted,

DATED: March 25, 2008

/s/ Sheila L. Shadmand

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of March, 2008, I caused a copy of the foregoing PLAINTIFF NATIONAL SECURITY ARCHIVE'S REPLY ON MARCH 18, 2008 ORDER TO SHOW CAUSE to be served electronically by the United States District Court for the District of Columbia's Electronic Case Filing ("ECF") and that this document is available on the ECF system.

/s/ Sheila L. Shadmand
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