IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. EXECUTIVE OFFICE OF THE PRESIDENT, et al., Defendants.	)	Civil Action No: 1:07-cv-01707 (HHK/JMF)
NATIONAL SECURITY ARCHIVE, Plaintiff, v. EXECUTIVE OFFICE OF THE PRESIDENT, et al., Defendants.	)	Civil Action No: 1:07-cv-01577 (HHK/JMF)

DEFENDANTS' MOTION TO DISMISS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Plaintiffs have repeatedly insisted that the relief they seek in this litigation is an order requiring defendants "to initiate action to recover lost or missing records." Mot. to Compel [97] at 2. Indeed, the allegation that threads throughout each of the briefs plaintiffs have submitted in the more-than-100 entries on the docket has been consistent: plaintiffs have asserted some variation of the claim that "to date the White House has made no recovery efforts" to restore millions of allegedly missing emails subject to the Federal Records Act ("FRA"), see CREW's

Emerg. Mot. for an Immediate Status Conference [98] at 4, and is therefore liable for "agency ***inaction***" under the Administrative Procedure Act ("APA") and mandamus statute. CREW's Renewed Mot. for Leave to Conduct Expedited Discovery [93] at 8 (emphasis in original).

Millions of dollars, countless hours and productive results of an extensive email restore process, however, prove plaintiffs' allegation untrue. In short, defendants ***have*** initiated the action that plaintiffs claim is wanting: defendants have expended substantial time and resources to "initiate action" to allocate and restore emails to the .PST file stores and confirm that millions of emails are not, in fact, missing as plaintiffs allege. Thus, whatever the validity of plaintiffs' agency inaction claims when their complaints were filed, defendants have since taken significant action to restore emails and confirm the integrity of the .PST file stores. This three-phase process covered email records governed by the Presidential Records Act ("PRA') and Federal Records Act ("FRA"), although plaintiffs seek relief only relating to FRA records. Notwithstanding the broader scope of the email recovery process to include PRA-governed records, the process confirms that defendants have "initiated action" within the meaning of the FRA.

Through the three-phased email recovery process, the Office of the Chief Information Officer ("OCIO") within the Office of Adminsitration determined that the 2005 review that grounds plaintiffs' complaints, and alleges missing and low days in the email archives, was flawed and limited. For example, the OCIO discovered that the counting tool used for the 2005 review had a message count limit of 32,000 e-mail messages per day in a .PST file. But because large .PST files contained more than 32,000 messages, the tool used for the 2005 review failed to "count" those messages and attribute them to components for specific days. Moreover, the 2005

review apparently relied on the name of the .PST file to allocate all of the individual e-mail messages contained within a file to the component named in the file, although a more precise tool developed by the OCIO in 2008 confirmed that e-mail messages within a .PST file were more accurately and precisely assigned to components based on message header information. The 2005 review also left approximately 10 million messages unallocated because the .PST file name could not be used for assignment of email messages, and relied on a "27-day rolling average" to statistically predict which days were "low," though the approach failed to account for seasonal variations in the time-series data.

As a result of the technical limitations of the 2005 review, 23 million messages that existed in the EOP email system in 2005 were not counted in the 2005 review. Accordingly, the 2005 review presented inaccurate message counts, concluding that approximately 81 million messages existed in the EOP e-mail system in 2005 when, in fact, approximately 104 million e-mail messages were preserved in the EOP e-mail system. Those 23 million messages were therefore never "missing," but rather uncounted or unallocated in the 2005 review. Through the email recovery process, OCIO was also able to allocate messages more precisely using a "PST Inventory Verification and Investigation Tool" that looked at message header information to associate individual messages with EOP components. Based on these more accurate counts, the OCIO applied an "Auto-Regressive Integrated Moving Average" ("ARIMA"), a statistical approach used widely for large data pools with time-series components to determine which, if any, component days could be considered statistically low. Based on the analysis of the

statistical model and additional email recovery process efforts, the OCIO concluded that 21 calendar days (covering 48 component days) could be considered statistically "low."[1]

OCIO, through contractors, restored data from disaster recovery back up tapes for those 21 calendar days and is currently de-duplicating and allocating the results of that recovery. The email recovery process has confirmed that: compared to the 2005 review concluding that 702 component days had problematic "low" message counts, OCIO's email recovery process has identified that 48 component-days are potentially "low"; compared to the 473 "zero" message count days identified in 2005, OCIO has identified only 7 (and of those, only 4 were statistically problematic). Based on these results, OCIO engaged in the limited restoration of e-mail messages from the disaster recovery back-up tapes. In short, defendants have "initiated action" within the meaning of the FRA.

Under controlling D.C. Circuit law, such ***agency action*** in the face of allegations of ***agency inaction*** moots any entitlement to relief and deprives this Court of subject matter jurisdiction. See Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990); Lawal v. U.S. Immigration and Naturalization Serv., Civ. No. 94-4606, 1996 WL 384917, *2 (S.D.N.Y. July 10, 1996) ("The only relief the complaint sought was a judicial order that [defendant] act. [Defendant] has acted."). "Even where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-

[1] The term "component days," as opposed to "calendar days," refers to days for specific components that were identified as "low" on one particular calendar day. Therefore, after the migration process from Lotus Notes to Exchange was completed, each calendar day contained 12 component days. The 2005 review showed some "low" counts for certain components on a specific day, but not for other components on that same day.

speculative chance of affecting them in the future." Clarke, 915 F.2d at 701 (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). "Where intervening events preclude the Court from granting plaintiffs any effective relief, even if they were to prevail on their underlying claim, the Court must dismiss a suit as moot for want of subject matter jurisdiction." Citizens Alert Regarding the Environ. v. Leavitt, 355 F. Supp. 2d 366, 369 (D.D.C. 2005) (citing Church of Scientology v. United States, 506 U.S. 9, 11 (1992)). Such intervening events—action to restore emails and confirm the integrity of the .PST file stores—preclude this Court from granting plaintiffs any relief here. See, e.g., Citizens Alert, 355 F. Supp. 2d at 369 ("[T]his Court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.").

Plaintiffs cannot alter the absence of subject matter jurisdiction by erroneously claiming that the jurisdictional issue is inextricably intertwined with the merits of their "agency inaction" claims, or by attempting to amend their counts alleging agency inaction to seek review of the "more recent agency action" which was never raised or challenged in the complaints. See Mot. to Compel [97] at 7-8 (regarding jurisdictional discovery); id. at 6 ("In other words, the defense is essentially that the consequences of agency inaction have been obviated by more recent agency action. But it is all agency action that is subject to review under the APA and on the basis of the administrative record."). Because defendants' extensive email restore recovery process moot plaintiffs' first four claims, they must be dismissed.

BACKGROUND

I. Statutory Framework: Federal Records Act

The provisions of the FRA were enacted to establish "standards and procedures to assure efficient and effective records management." 44 U.S.C. § 2902. Those standards and procedures were prescribed to attain "[a]ccurate and complete documentation of the policies and transactions of the Federal Government" and for the "[j]udicious preservation and disposal of records." Id. § 2902(1), (5). Consistent with these goals, the head of each Federal agency is tasked to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency[.]" Id. § 3101. Balanced against these obligations, agency heads are charged with providing for "economical and efficient management of the records of the agency." Id. § 3102. Accordingly, the FRA requires agencies simply to preserve records "to the extent required to document the organization, functions, policies, decisions, procedures and essential transactions of the agency." 36 C.F.R. § 1220.14 (2002) (emphasis added).

The reach of the FRA depends in part on whether a document is a "record" within the meaning of the FRA. 44 U.S.C. § 3301. Documentary materials are considered "records" subject to preservation when they meet two conditions: they are (1) "made or received by an agency . . . under Federal law or in connection with the transaction of agency business; and (2) are "preserved or are appropriate for preservation as evidence of agency organization and activities or because of the value of the information they contain." See 36 C.F.R. § 1222.34(b).

To facilitate economical and efficient preservation of records, agency heads and the Archivist of the United States are directed by the FRA to promulgate guidelines for disposal of

temporary and schedules for records authorized for disposal. See 44 U.S.C. §§ 3302, 3303, 3303a. But the FRA does not demand absolute compliance with its prescriptions. Rather, as the D.C. Circuit has recognized "the determination of whether a variety of particular documents or computer entries are, in fact, records must be made by agency staff on a daily basis, and some innocent mistakes are bound to occur. Consequently, the fact that some record material may have been destroyed does not compel a finding that the guidelines are arbitrary and capricious." Armstrong v. EOP, 924 F.2d 282, 297 n.14 (D.C. Cir. 1991). Indeed, Congress's command to balance the economies of records management against the interest in preserving records does not permit any alternative conclusion. See, e.g., Rogers v. Peck, 199 U.S. 425, 436 (1905) ("Statutes should be given a reasonable construction with a view to make effectual the legislative intent in their enactment.").

Nor does the FRA require agencies to maintain electronic recordkeeping systems to preserve federal records, or to operate recordkeeping systems like "ARMS" as plaintiffs contend. Public Citizen v. Carlin, 184 F.3d 900, 910 (D.C. Cir. 1999) ("[W]e do not think the Archivist must, under the RDA [which comprises part of the FRA], require agencies to establish electronic recordkeeping systems. Nor do we think it unreasonable for the Archivist to permit each agency to choose, based upon its own operational needs, whether to use electronic or paper recordkeeping systems."), cert denied 529 U.S. 1003 (2000). Rather, electronic recordkeeping is determined by the agency, often in consultation with NARA. See generally, 44 U.S.C. § 3102 (it is for "the head of each Federal agency" to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency").

The FRA also incorporates enforcement mechanisms for the unlawful removal or destruction of records that should otherwise have been preserved. See, e.g., 44 U.S.C. § 3106. If the head of the agency becomes aware or has reason to believe any "actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency" has occurred, she, along with the Archivist, may "initiate action through the Attorney General for the recovery of records[.]" Id. Similarly, "[i]n any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made." 44 U.S.C. § 2905(a). The Archivist or the agency head need not, however,

> initially attempt to prevent the unlawful action by seeking the initiation of legal action. Instead, the FRA contemplates that the agency head and Archivist may proceed first by invoking the agency's " safeguards against the removal or loss of records," 44 U.S.C. § 3105, and taking such intra-agency actions as disciplining the staff involved in the unlawful action, increasing oversight by higher agency officials, or threatening legal action.

Armstrong, 924 F.2d at 296 n.12. This administrative scheme is exclusive; a court cannot itself order the recovery or retrieval of records that may have been removed or destroyed, but must instead rely on the detailed processes set forth in the FRA and initiated by the agency heads, Archivist and Attorney General. See Armstrong, 924 F.2d at 294 ("Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions."). Thus, relief under the FRA would trigger, at most, obligations for defendants to initiate action through the Attorney General,

who would, in turn, determine what action was appropriate under the circumstances. 44 U.S.C. § 3106; see also Armstrong, 924 F.2d at 296. A court, therefore, cannot order the recovery or retrieval of any records.

II. SCOPE OF PLAINTIFFS' CLAIMS

On September 5, 2007, NSA filed an eight-count complaint, charging in the first four counts that defendants had failed their duties to initiate action through the Attorney General to preserve and restore FRA records allegedly missing "from the White House servers since March 2003 through the present." NSA Compl. ¶¶ 36, 44-68. Specifically, in counts one and two, NSA alleges that defendants violated 44 U.S.C. §§ 2905 and 3106 by failing to "request that the attorney general initiate action or seek other legal redress to recover" emails allegedly deleted or missing from "White House servers." NSA Compl. ¶ 18. Plaintiffs seek relief for the alleged "agency inaction" in the form of a declaratory order that defendants violated their statutory responsibility under the Federal Records Act and an injunctive order "compelling" defendants to "request that the attorney general initiate action, or seek other legal redress, to recover the deleted e-mails." NSA Compl. ¶¶ 44-54. In counts three and four, NSA seeks a writ of mandamus ordering defendants to request the Attorney General to initiate action under 44 U.S.C. §§ 2905 and 3106 to recover the allegedly deleted or missing emails. NSA Compl. ¶¶ 61, 68.

In the latter four counts, NSA seeks to compel defendants to establish an "adequate archival system . . . for the archival and preservation of e-mails." Id. ¶¶ 69-98. NSA contends specifically in counts five and six that defendants have failed to install an "adequate system for preserving and archiving" federal records, thereby "harming [NSA] by denying it future access

to these important historical documents." NSA Compl. ¶¶ 74, 81. In counts seven and eight, NSA requests a writ of mandamus ordering defendants to comply with provisions of the FRA.

ARGUMENT

A plaintiff bears the burden of establishing the factual predicates of jurisdiction when subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(1). See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1991); Erby v. United States, 424 F. Supp. 2d 180, 182-183 (D.D.C. 2006). "If a defendant mounts a 'facial' challenge to the legal sufficiency of the plaintiff's jurisdictional allegations, the court must accept as true the allegations in the complaint and consider the factual allegations of the complaint in the light most favorable to the non-moving party." Erby, 424 F. Supp. 2d at 182. "If, on the other hand, the movant challenges the factual basis for jurisdiction, 'the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant,' but 'must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.'" Id. at 183.

On a factual challenge, "the plaintiff's jurisdictional averments are entitled to no presumptive weight; the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties." Id. at 183. In resolving the question of jurisdiction, the court may consider materials beyond the pleadings. "[W]here necessary, the court therefore may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Herbert v. Nat'l Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992).

I. THE FIRST FOUR CLAIMS ARE MOOT

"Article III, section 2 of the Constitution limits federal courts to deciding 'actual ongoing controversies." Alliance for Democracy v. FEC, 335 F. Supp. 2d 39, 42 (D.D.C. 2004) (quoting 21st Century Telesis v. FCC, 318 F.3d 192, 198 (D.C. Cir. 2003)). Accordingly, "[e]ven where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Clarke, 915 F.2d at 701 (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). "Where intervening events preclude the Court from granting plaintiffs any effective relief, even if they were to prevail on their underlying claim, the Court must dismiss a suit as moot for want of subject matter jurisdiction." Citizens Alert Regarding the Environ. v. Leavitt, 355 F. Supp. 2d 366, 369 (D.D.C. 2005) (citing Church of Scientology v. United States, 506 U.S. 9, 11 (1992)). A "federal court has no power to render advisory opinions [or] . . . decide questions that cannot affect the rights of the litigants in the case before them." Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997).

The mootness doctrine prohibits review of both injunctive and declaratory requests for relief, as plaintiffs seek here. "Where a plaintiff's specific claim is moot and otherwise fully resolved, . . . [and] a plaintiff has made no challenge to some ongoing underlying policy, but merely attacks an isolated agency action, then the mooting of the specific claim moots any claim for declaratory judgment that the specific action was unlawful[.]" American Postal Workers Union v. United States Postal Serv., Civ. No. 06-726, 2007 WL 2007578 (D.D.C. July 6, 2007) (quoting City of Houston, Texas v. Dep't of Housing & Urban Devel., 24 F.3d 1421, 1429 (D.C.

Cir. 1994)); see also Fraternal Order of Police v. Rubin, 134 F. Supp. 2d 39, 41-42 (D.D.C. 2001) ("When a plaintiff attacks an isolated action, rather than an ongoing policy, 'the resolution of the claim moots any request for declaratory relief.'"); Del Monte Fresh Produce Co. v. United States, 565 F. Supp. 2d 106, 110 (D.D.C. 2008).

These established principles required dismissal of moot agency inaction claims in Alliance for Democracy v. Federal Election Commission. 335 F. Supp. 2d at 43. There, plaintiffs complained that the defendant agency, the Federal Election Commission, "failed to act or delayed in acting" as required by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 437(g)(A)(8) ("FECA"). As here, FECA "allow[ed] for ***limited judicial review*** of whether the Commission's 'failure to act' on an administrative complaint is 'contrary to law.'" Id. at 43 (emphasis added); see also Armstrong, 924 F.2d at 295 (limited review under FRA). The court determined that the FEC had provided evidence that it had "completed all the actions delay of which could arguably be found 'contrary to law'" under FECA, and because "the FEC has taken action, so it can no longer be said to have failed to act." Alliance for Democracy, 335 F. Supp. 2d at 43. Because FECA limited relief to an "order in which the court may declare . . . the failure to act is contrary to law and may direct the Commission to conform with such a declaration within 30 days," "the order the Circuit court speaks of would be nothing more than an order directing the FEC to do what it has already done." Id. The court dismissed the claims as moot and for want of subject matter jurisdiction. See also Lawal, 1996 WL 384917 at *2 ("Assuming that subject matter jurisdiction otherwise exists, it is lacking in the case at bar because plaintiffs' action is moot. The only relief that the complaint sought was a judicial order that the INS act. The INS has acted."); Johnson v. Philadelphia Housing Authority, Civ. No. 93-

2296, 1995 WL 395950, *2 (E.D. Pa. June 29, 1995) ("Since the action plaintiff sought to be compelled – the issuance of regulations – has in fact been accomplished, any claim brought pursuant to 706(1) is now moot.").

The same controlling principles compel the same result here. See Exhibit 1, Decl. Of Stephen M. Everett ("Everett Decl."). The Office of Chief Information Officer ("OCIO") in the Office of Administration engaged in a deliberate effort—at serious expense in terms of time, money and resources—to address the concerns initially flagged in the 2005 review that grounds plaintiffs' complaints.

A. EOP E-mail Message Archives

A brief description of the "email message archives" alleged to be deficient in plaintiffs' complaints assists in understanding plaintiffs' claims and the recovery process. The "EOP e-mail message archives" is the repository of archived emails from the EOP Network for the Microsoft Exchange email system. See Everett Decl. at 2. Prior to use of the Microsoft Exchange email system, the components of EOP used Lotus Notes to send and receive emails. However, a determination was made to migrate EOP components to Exchange, and the components were migrated over (through various pilot periods) through the course of two years. When Exchange was first deployed at the EOP, emails were archived through "Exchange Journal Mailboxes," which contained a duplicate copy of every email sent or received by EOP components on the EOP Network. When a Journal reached its storage capacity, a .PST file was then manually created by contractors within OA to archive the messages contained in the Journal. A .PST file therefore contained multiple e-mail messages in its archived form, and was stored in the EOP e-mail message archives. The names of each .PST file contained the name of

the component from which the messages were supposed to have been Journaled. Id. at 2.

In late 2004, OCIO developed an operating procedure for the inventory of .PST files in the email message archives. In addition, a .PST file database was developed, and the process for moving files from Journal to .PST files was automated with a program called "Mail Attender." As with the process used above, Mail Attender relied on the creation of a duplicate copy of every email sent or received by EOP components on the EOP Network. Thus, the EOP email process is "bifurcated," resulting in two identical messages on the Exchange server for every message sent or received on the EOP Network. One message is placed into the Journal Mailbox for the component sending or receiving the email, and the other message is contained in the user's mailbox. As before, this email bifurcation process is automated, and no end user may control it. Mail Attender then automatically moves emails from the component Journal Mailbox into .PST files in the appropriate component directory. Those .PST files constitute the email message archives. Id.

B. 2005 Review

In late 2005, members of OCIO attempted to identify the number of e-mail messages archived in .PST files by various Executive Office of the President ("EOP") components for dates ranging between January 1, 2003 and August 10, 2005, and concluded that 702 component days between January 1, 2003 and August 10, 2005 had "low" message counts in the EOP email system, including 473 component days that had zero message counts. OCIO presented the results of the inventory process in a spreadsheet referred to as the "Red/Yellow Chart," and more widely as the "2005 Chart." See Everett Decl., Ex. 1. The 2005 review identified EOP components for which message levels were considered low for certain days ("yellow" days); it

identified a total of 229 low or "yellow" component days. See supra note 1 (regarding "component days" vs. "calendar days"). The 2005 review also identified component days for which there appeared to be zero messages archived ("red" days); it identified a total of 473 "red" component days, that is, days in which it appeared that a particular EOP component had zero e-mail messages preserved in the e-mail message archives. Id. at 3.

Through a three-phased email recovery process, OCIO determined that the 2005 review was flawed and limited. First, the 2005 effort evidently attempted to identify the number of e-mail messages preserved by the various EOP components on specific dates by counting the number of email messages contained in .PST files. As described above, .PST files are "personal storage table" files in which Microsoft Outlook email messages are saved. One .PST file contains many individual email messages. The 2005 effort assumed that all email messages counted within a .PST file were assigned to the correct components in all cases based on the name of the .PST file. As OCIO discovered, however, .PST files could contain messages for multiple components, and all messages within a .PST file accordingly could not be counted for the component named in the .PST file name. The 2005 review also left approximately 10 million messages unallocated because the .PST file name could not be used for assignment of email messages. See id. at 3.

In addition, the "low day" determinations in that 2005 effort were based on statistical averages using a 27-day cycle of e-mail counts to determine if the count for a particular day was statistically low. This method, however, did not account for factors that could vary counts within a short period of time such as weather-related closures and holidays, when "low counts" or "zero days" might be expected, and especially for low population components (like CEA) that

were not issued Blackberry devices. See id. at 3.

The 2005 effort also failed to account for seemingly "low" email counts that were attributable to the pilot program process used to deploy Microsoft Exchange. For example, the 2005 review appears to have assumed that any use of Exchange for e-mail by certain employees meant that the component had entirely migrated to Exchange. As OCIO ultimately determined, however, that assumption was incorrect. There were breaks in use of Exchange where components would return to Lotus Notes use (owing, for example, to the budget season), and certain components required extended periods of time before the majority of its employees used Exchange, rather than Lotus Notes. Accordingly, for "pilot periods" in 2003 through mid-2004 for some components, not all employees within a component had been transferred to Microsoft Exchange from Lotus Notes, leading to artificially "low" and "zero" counts for the archives for that component during the pilot period days. Id. at 4.

OCIO also concluded that the tool used to "count" messages in the 2005 effort was limited. For example, the tool stopped counting messages when a .PST file for a single day contained more than 32,000 e-mail messages. As OCIO learned, .PST files did contain more than 32,000 e-mail messages. As a result, the 2005 effort failed to count all of the e-mail messages within large .PST files, reporting "low" numbers when the e-mail messages in fact existed in the archives.

As a result of the technical limitations of the 2005 review, approximately 23 million messages that existed in the EOP email system in 2005 were not counted in the 2005 review. Accordingly, the 2005 review presented inaccurate message counts, concluding that approximately 81 million messages existed in the EOP e-mail system in 2005 when, in fact,

approximately 104 million e-mail messages were preserved in the EOP e-mail system. Those 23 million messages were therefore never "missing," but simply uncounted in the 2005 review.

B. Three-Phase Recovery Process

To address the issue raised by the 2005 review, a team composed of various members of the OCIO staff performed an analysis of the e-mail message archives to determine if any emails could be considered "missing" from the archives and, if needed, to consider a recovery effort. The team pursued a three-phase approach to address the possibility that there may have been a substantial number of e-mails missing from the EOP e-mail message archives.

a. Phase I

The primary purpose of Phase I was to study the 2005 review and to recreate the inventory underlying that review, but with better technology. See Everett Decl. at 5-7. The OCIO team conducted a new inventory of the .PST files created in connection with e-mail messaging using Microsoft Exchange. In creating the new inventory, the team relied on the name on the .PST file in which the messages were located to associate the messages with specific EOP components, as had been the case in the 2005 effort.

However, the Phase I process differed from the 2005 review in important ways:

First, OCIO determined that a number of "low" or "zero" days from the 2005 review were not the result of "missing" emails, but due to the limited number of messages that were actually sent or received on the Exchange system during the migration of the EOP e-mail system from Lotus Notes to Microsoft Exchange. The 2005 effort evidently counted days in "pilot periods" when a component had not entirely migrated to Microsoft Exchange as "low," even though the component employees were on both Lotus Notes—where emails were archived in a

separate system, "ARMS"—and some on Exchange. OCIO was able to determine the dates of migration, as well as the "pilot periods" of use of Exchange, by reviewing Exchange migration schedules that were available, and by reviewing the Exchange email volume and the volume of emails captured on ARMS for specific components. These reviews enabled OCIO to determine, for example, that the Office of Management and Budget (OMB) used Exchange during a three-month pilot program, then entirely terminated use of Exchange in favor of Lotus Notes for a two-month period owing to "budget season" considerations, and then engaged in another extended eight month pilot period while some staff used Lotus Notes and other Exchange. This discovery addresses the "zero" days from November 1, 2003 through December 29, 2003 on the 2005 review for OMB, as an example. Thus, in Phase I, OCIO confirmed that the suspected "anomaly" of zero-message days in the 2005 review for that period for OMB was not the result of "missing emails." Similar analyses confirmed that the pilot periods for the migration from Exchange to Lotus Notes was not accounted for in the 2005 review. See Everett Decl. at 5-6.

The team also discovered and eliminated a "counting" limitation found in the tool used in 2005 for the inventory of messages in .PST files. That tool (called "CMDFI") had a message count limit of 32,000 e-mail messages per day in a .PST file. Because some .PST files did contain more than that number of message objects, and due to this flaw, the 2005 inventory resulted in inaccurately low counts for certain .PSTs. During Phase I, the team was able to count with the tool without the limitation and achieve accurate message counts for large .PST files.

Based only on this first level of analysis, OCIO determined at the conclusion of Phase I the following: (1) That the "zero" message component-day count had dropped from 473 to 293; and (2) that the total message count for the electronic inventory had increased from the

approximately 81 million counted in the 2005 review to a new total of approximately 103 million.[2] The OCIO team concluded that the 2005 effort had failed to account for approximately 22 million messages that existed in 2005 in the EOP email message archives, and that effort had not succeeded in counting and associating those messages with components in the 2005 review.[3] Id.

In 2005, there were approximately 10 million messages that could not be allocated to a component based on the .PST file name[4]; Phase I identified approximately 14 million such messages.[5] To effectively allocate these 14 million messages, the OCIO team concluded that it would be necessary to investigate the messages at the message-header level—i.e., the portion of the message indicating sender, recipient, date, time, etc. By reading message-header information, the team could find out more precisely what EOP components should be associated with a given e-mail message. Id.

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[2] In the 2005 chart, the 81 million total number of messages listed included messages counted during the pilot periods. When the flaw in methodology regarding the pilot periods was discovered in Phase I, message counts attributable to pilot periods were no longer included in analyses of "low" days because they were not consistent series that represented all messages of a component for that time. As confirmed using the more accurate PIVIT tool in Phase II, nearly 9 million messages are in the archives for the pilot periods. The 94 million messages counted in Phase I does not include those 9 million messages, which means a total of approximately 103 million messages were counted in Phase I.

[3] Even excluding the pilot period message counts means that nearly 13 million messages that existed in 2005 in the EOP email message archives were not counted and associated with components in the 2005 review.

[4] Thus, of the approximately 81 million messages identified in the 2005 effort, only 71 million were attributed to components. The 10 million messages were identified on the 2005 review as "issues" files.

[5] Thus, of approximately 103 million messages identified in Phase I, approximately 89 million were attributed to components.

Phase I revealed another significant limitation in the 2005 approach: the use of a 27-day rolling average to determine statistically "low"-day counts—an approach that did not account for seasonal variations in the data. The team quickly realized it needed a more sophisticated statistical approach for determining what days had "low" message counts. Phase II was developed with an eye toward addressing these concerns. Id.

b. Phase II

In Phase II, the OCIO team analyzed the .PST file inventory by using a new scanning and indexing tool that was able to read message-header information and then associate individual messages with EOP components on that basis. See Everett Decl. at 8-10. Thus, rather than rely on the name of the .PST file to attribute all messages within the file to the component in the .PST file name, OCIO was able to allocate messages within .PST files to the appropriate component with significantly more precision. Due to the unavailability and/or uncertainty of commercially available products, the new tool was developed in-house. The resulting tool—known internally as the *PST Inventory Verification & Investigation Tool* (PIVIT)—allowed OCIO to allocate messages to the appropriate EOP component. PIVIT was reviewed by a third party contractor, and independently verified as an accurate tool in both methodology and process. Id.

While PIVIT was initially developed to associate each of the 14 million unallocated messages found in Phase I with a particular component, the new tool also enabled the OCIO team to more precisely allocate all of the messages in all of the .PST files in the e-mail message archives for the First Inventory Period of January 1, 2003 through August 10, 2005. In effect,

each of the e-mail messages contained in .PST files was appropriately allocated to a component in Phase II.

PIVIT counted approximately 94 million unique e-mail messages from the First Inventory Period, excluding the pilot period message counts. Including the approximately 9 million messages counted in the email message archives for pilot periods, the message count totaled approximately 103 million messages. In addition, OCIO was able to locate other repositories of e-mail messages that were not accounted for in the email message archives, such as PSTs created as a result of searches or mailbox restorations due to file corruption, which added approximately one million unique messages, for a total of approximately 95 million messages, excluding the pilot periods (establishing a total of approximately 104 million including the archived messages from the pilot periods). Among these 95 million messages, more than 83 million were successfully associated with EOP components on the basis of message-header information with PIVIT. (The roughly 12 million messages that could not be associated with a component were either "system" messages or "undeliverable" messages, categories of messages that by definition do not have a component of origin or receipt.) Thus, compared to the 71 million messages associated by component in the 2005 effort, OCIO confirmed that 83 million messages were in the email message archives in Phase II, excluding pilot periods. Thus, 12 million emails that were not associated by component or not counted at all in 2005 were counted and associated to components in Phase II. Including the approximately 9 million messages in the email archives for pilot periods, nearly 92 million messages were attributed to components at the conclusion of Phase II.[6]

[6] On the chart attached as Exhibit 2 to the Everett Declaration, adding up the sum of emails

In addition, whereas the 2005 review identified 473 "zero" message component-days, and Phase I counted 293 "zero" component days, the results of Phase II using the PIVIT tool established that only 7 component-days had zero messages. By allocating the previously unallocated messages, and allocating messages within .PST files to the appropriate component with more precision and accuracy using PIVIT, Phase II reduced the 2005 count of 473 component-days with "zero" messages to 7.

Having assigned roughly 83 million messages to specific component-days, excluding pilot periods, and having identified only 7 "zero" component-days after that process, OCIO then confronted how to analyze whether any message counts for component days was statistically low.[7] In order to address that question, the OCIO team believed that it needed to replace the 27-day rolling average used in the 2005 review with a more sophisticated time-series approach for assessing the e-mail message counts produced by PIVIT. OCIO engaged a recognized authority in this methodology, Dr. Nancy J. Kirkendall, to recommend a more accurate statistical approach. Dr. Kirkendall recommended the analysis of the e-mail counts using an "Auto-Regressive Integrated Moving Average" (ARIMA) model, an approach used widely for large data pools with time-series components.[8] The ARIMA model was used to identify days or

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from the row entitled "2008 Counts incl. pilot" (approx. 92 million) with the approximately 12 million in the Final "system" and "undeliverable" columns on the right add up to 104 million total email messages in the archives. Similarly, adding the "Total" on the right side table in light blue (approx. 95 million) with the row entitled "2008 pilot counts" (approx. 9 million) total to the 104 million messages.

[7] As explained above, only message counts from non-pilot periods were analyzed.

[8] For example, ARIMA models are used by the U.S. Bureau of the Census to analyze time series census data, by the Institute of Electrical and Electronics Engineers to predict electricity prices, and to forecast sugar cane production in India. Dr. Kirkendall's paper, Time Series Analysis of

groups of days with statistically significant low e-mail counts for further investigation and possible restore from disaster recovery back-up tapes. See Everett Decl. at 10.[9]

At the conclusion of Phase II, the ARIMA model identified 76 potentially "low" component days in the e-mail message archives. Phase II accounted for approximately 95 million e-mail messages in the First Inventory Period, excluding the pilot periods. Based in part on these results, OCIO determined that the disaster recovery back up tapes should used to in order to recover any potentially missing messages. This final phase of the e-mail recovery effort was known as Phase III. Id.

b. Phase III

At the beginning of Phase III, OA awarded a restoration-process contract to a third-party vendor in August 2008 to help OA complete the work of Phase III. In the first step of Phase III, the contractor created a copy of approximately 26,000 disaster recovery back-up tapes which were last written on dates in the First Inventory Period. The contractor created the copies in

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Daily Email Counts, fully explains the technical approach that was used to develop and apply the ARIMA model that was used for the e-mail analysis. The description herein only describes the analysis methodology used for the model's output.

[9] It is important to note, however, that the report was issued for application of the ARIMA model to message counts at the conclusion of Phase II. As explained below, however, additional email messages (approximately a few hundred thousand) restored at the beginning of Phase III were not counted in this report. The ARIMA model was run over the results of the message counts including the messages restored in Phase III, though Dr. Kirkendall did not produce another formal report. The report is therefore most helpful in explaining the methodology of the ARIMA model, though the numbers reported are not accurate. As could be expected in a statistical model seeking outliers, some days that had additional e-mail allocated were no longer indicated by ARIMA as low days, and new days that had not been previously indicated in the ARIMA model as low days were now indicated as such due to a change in counts for other days. In short, because the message counts had changed when the messages from an additional 116 .PST files were added, as described below, the statistical model predicted that some days that were previously "low" were no longer low, and that some days that were previously statistically

order to create a possible cache of tapes to use for any restore process. See Everett Decl. at 10-13.

In the next step of Phase III, a subset of the backup tapes was used to restore 125 .PST files, which had been identified in previous work as existing at one point, but which the team could not locate during Phase II. Specifically, based on a prior analysis, there was information that led OCIO to believe that up to 125 .PST files were not in the .PST file stores, but that existed at one time; with a number of those believed to be duplicates of existing PSTs with different file labels. All 125 PSTs were located and restored, and 9 were determined to be duplicates. The 116 resulting PSTs were indexed and de-duplicated against the index created during the Phase II work. The messages recovered from the disaster recovery back-up tapes from these 116 .PST files (approximately a few hundred thousand unique messages) were added to the e-mail message archives, and the de-duplicated counts of email messages including those restored emails were again analyzed using the ARIMA statistical model to determine if any component day counts could be considered statistically low. See id.

Running the ARIMA model on the number of messages assigned to components resulted in 106 potentially "low" component days; 40 of these potentially "low" component days were in Federal Records Act components. There was no movement in the total number of "zero" message component-days found after the 116 .PST files were restored; it remained at 7. Of those 7 component-days with "zero" message counts, the ARIMA model highlighted 4 component-days as potentially "low." After reviewing the 106 component days that were potentially low, and considering whether explanations like snow days, the day after Thanksgiving, population of

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"sound" were now considered low.

component, or other calendar impacts that were not accounted for in the ARIMA model could explain the potentially "low" counts, OCIO in consultation with counsel and OA staff selected 21 calendar days to be restored from the disaster recovery tapes by the contractor. Those 21 calendar days covered 48 of the 106 component days determined to be statistically low in the ARIMA model. Of those 48 component days, 18 were FRA component days. Also included among the 48 restored component-days are the 4 "zero" message component-days that ARIMA identified as potentially problematic. Id.

OCIO has now restored emails for the selected 48 component-days from the copy set of the disaster recovery back-up tapes. OCIO and the contractor are completing the analysis of the messages to determine what, if any, messages might have been found in the restored files from tapes that were not previously accounted for in the e-mail message archives. See Exhibit 2 (Memorandum of Understanding describing OCIO's ongoing commitment to process and sort any unique emails from the restore and allocate them to components). All results of this work, including all of the de-duplicated restored PRA e-mail, and all indices made of the restored e-mail, will be transferred to NARA.[10] Id.

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[10] The federal emails will remain under FRA EOP control and returned to OA at the conclusion of the process.

In short, defendants have "initiated action" within the meaning of the FRA.[11] OA has engaged in a deliberate effort – costing over $10 million dollars, many thousands of staff hours and the energy of OA personnel – to address the concerns initially flagged in the 2005 review. OA has completed all that reasonably may be done to restore any records that may exist that are potentially not contained in the e-mail message archives by using the disaster recovery back up tapes. That effort has resulted in a reduction in problematic "low" days from 702 component-days (2005 review) to 48 component-days. The number of "zero" message count component-days has dropped from 473 (2005 review) to 7, of which only 4 were identified by the statistical model as potentially problematic. Based on these results, OA decided to engage in the restoration of e-mail messages from back-up tapes for 48 component days. Compared to the approximately 81 million messages identified in 2005, OCIO has concluded that approximately 104 million (23 million additional messages) messages exist in the EOP email system that the 2005 effort failed to count and account. Through this effort OA has adequately addressed the concerns raised by the 2005 chart or otherwise about "missing emails," and taken appropriate, reasonable steps to recover any potentially missing e-mail messages.

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[11] Moreover, as the D.C. Circuit explained in Armstrong, the limited judicial review of "the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General" is to trigger the ***administrative*** and Congressional oversight provisions of the FRA. "Unless the Archivist notifies the agency head (and, if necessary, Congress) and requests the Attorney General to initiate legal action, the administrative enforcement and congressional oversight provisions will not be triggered, and there will be no effective way to prevent the destruction or removal of records." Armstrong, 924 F.2d at 295. It is indisputable, however, that the Attorney General has been made aware of plaintiffs' claims, see,e.g., Ex. 3 (Feb. 4, 2008 Letter from CREW to the Attorney General), or that the United States House of Representatives Committee on Oversight and Government Reform has been investigating plaintiffs' claims. See id. (Ex. 2 (attached to letter) (January 17, 2008 Letter from Chairman Waxman to Counsel to the President)). Whatever notification would be ordered as relief on plaintiffs' first four claims has evidently been accomplished.

Because plaintiffs' first four claims are moot by the actions defendants have taken, they must be dismissed.

II. PLAINTIFFS HAVE NOT ALLEGED AGENCY ACTION TO SEEK JUDICIAL REVIEW ON THEIR FIRST FOUR CLAIMS AND MAY NOT AMEND THEIR COMPLAINT TO ADD AGENCY ACTION REVIEW, WHICH IS FORECLOSED BY THE FEDERAL RECORDS ACT

Plaintiffs cannot evade the consequences of defendants' action on their agency inaction claims by reframing them in their brief as claims seeking review of agency action. As this court has made clear, the "allegations in the complaint, rather than the briefs, dictate what specific claims are before the court." Del Monte, 565 F. Supp. 2d at 110; see also Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) (holding that claims raised for the first time in an opposition to a dispositive motion are not properly before the court); Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996); Fisher v. Metro. Life Ins. Co., 895 F.2d 1073, 1078 (5th Cir. 1990); Arbitraje Casa de Cambio, S.A. v. United States Postal Serv., 297 F. Supp. 2d 165, 170 (D.D.C. 2003). Particularly where "plaintiffs are resisting a mootness claim . . . they must be estopped to assert a broader notion of their injury than the one on which they originally sought relief." Clarke, 915 F.2d at 703 (noting that without this limitation, "[t]he opportunities for manipulation are great").

Agency inaction claims under section 706(1) of the Administrative Procedure Act are particularly limited in scope. "A claim under 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 124 S. Ct. 2373, 2379 (2004). Agency inaction claims therefore involve "circumscribed, discrete agency actions," id., and cannot morph into

"broad programmatic attacks." Id. Accordingly, in converse situations, "[c]ourts have steadfastly refused to permit plaintiffs to evade the APA final agency action requirement by recasting a disagreement with what the agency has done as a 'failure to act' claim," recognizing the doctrinal distinction between agency inaction and agency action review. Am. Farm Bureau v. United States Environ. Prot. Ag., 121 F. Supp. 2d 84, 103 (D.D.C. 2000); see also Public Citizen v. Nuclear Regulatory Comm., 845 F.2d 1105, 1108 (D.C. Cir. 1988) (disfavoring agency action claims being brought as agency inaction claims because "[a]lmost any objection to an agency action can be dressed up as an agency's failure to act"); Am. for Safe Access v. United States Dep't of Health & Human Serv., Civ. No. 07-1049, 2007 WL 2141289 (N.D. Cal. July 24, 2007) (requiring plaintiff to amend complaint to raise agency inaction claim where complaint otherwise alleged only agency action claims).

Plaintiffs have made clear that they seek an order on their first four claims based on allegations of agency inaction. Thus, plaintiffs have claimed that

- "Despite having notice that over five million e-mail records have been deleted, the Archivist has neither assisted the EOP nor the heads of its component agencies such as the OA in initiating action through the Attorney General to recover e-mails, nor has the Archivist requested the Attorney General to initiate action after the failure of the EOP and its component agencies to act within a reasonable time." NSA Compl. ¶ 47.
- "By failing to restore the deleted e-mails, Defendant Archivist has violated his duty under 44 U.S.C. § 2905 to request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails, thereby harming Plaintiff by denying it future access to these important historical documents." NSA Compl. ¶ 48; see also id. ¶ 60.
- "Plaintiff is therefore entitled to relief in the form of a declaratory order that Defendant Archivist is in violation of his statutory responsibility under 44 U.S.C. § 2905, and an injunctive order compelling Defendant Archivist pursuant to that statute to request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails." NSA Compl. ¶ 49; see also id. ¶ 61.
- "By failing to restore the deleted e-mails, Defendants EOP and OA have violated their duty under 44 U.S.C. § 3106 to request that the Attorney General initiate action, or seek

other legal redress, to recover the deleted e-mails, thereby harming Plaintiff by denying it future access to these important historical documents." NSA Compl. ¶ 53; see also id. ¶ 67.

- "Plaintiff is therefore entitled to relief in the form of a declaratory order that Defendants EOP and OA are in violation of their statutory responsibility under 44 U.S.C. § 3106, and an injunctive order compelling Defendants EOP and OA pursuant to that statute to request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails." NSA Compl. ¶ 54; see also id. ¶ 68.

Further, in their prayer for relief, plaintiffs have requested that the Court "declare the ***inaction*** of all defendants to restore deleted e-mail records a violation of federal law" and seek an "order, in the form of injunctive and mandamus relief, all defendants to restore deleted e-mails from the back-up tapes and to maintain and preserve the federal and presidential records comprised therein." Id. at 27 (emphasis added). Plaintiffs cannot therefore diverge from the scope of its complaint to reframe the controversy as a broader request for review of agency action. See Mot. to Compel [97] at 6 ("To the contrary, Defendants allege they are now taking action sufficient to bring them into compliance with the FRA – compliance which the Plaintiff disputes. Thus, if the Archive prevails, the Court may still issue effective injunctive relief. In other words, the defense is essentially that the consequences of agency inaction have been obviated by more recent agency action. But it is all agency action that is subject to review under the APA and on the basis of an administrative record."); Reply in Support of Mot. to Compel [109] at 2 (erroneously contending that "defense that Defendants say they will present boils down to one simple point: that these factual allegations are untrue").

This is particularly so in light of the limitation of review under the Federal Records Act. As the D.C. Circuit has made clear, the "FRA contains a prescribed method of action" when allegations arise that an agency is not retaining records: "it requires the agency head, in the first

instance, and then the Archivist to request that the Attorney General initiate an action to prevent the destruction of documents, thereby precluding private litigants from suing directly to enjoin agency actions in contravention of agency guidelines." Armstrong, 924 F.2d at 294. Because private actions to seek restoral of records "would clearly contravene th[e] system of administrative enforcement" set forth in the FRA, the D.C. Circuit has instructed that the FRA does not "authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records[.]" Id. The limited claim permitted under the FRA for alleged disposal violations is "to permit judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General." Id. That limited review "reinforces the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions will operate as Congress intended." Id.

Notwithstanding the bar on amending plaintiffs' agency inaction claims now, any attempt to amend the claims to seek judicial review of defendants' administrative actions is precluded by the FRA itself. Contrary to plaintiffs' contentions, at bottom, any request for review of defendants' actions would amount to an impermissible attempt to "invoke the federal courts to prevent an agency official from improperly destroying or removing records." Armstrong, 924 F.2d at 294; compare Reply in Support of Mot. to Compel [107] at 6 (erroneously contending that "[w]hile agencies may satisfy the FRA through measures other than initiating action through the Attorney General, ***those actions are subject to judicial review***"). Indeed, other than the

"discrete action" of notifying the Attorney General, no judicial review of the administrative process for recovery of any records is permissible under the FRA.[12]

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[12] For the same reason that plaintiffs cannot diverge from their agency inaction claims pled in their complaints, "the merits issues" are not "inextricably intertwined with the attack defendants mount on jurisdiction." Reply in Support of Mot. to Compel [109] at 4. Thus, the issues in defendants' motion to dismiss are not, as plaintiffs contend, "in fact the exact same issues" raised in plaintiffs' complaints. Id.

As set forth above, plaintiffs' contention rests on a misunderstanding of scope of judicial review permitted under the FRA. First, their agency inaction claim raises the issue of whether defendants failed to take a "circumscribed, discrete agency action" based on the allegations of missing emails. Whatever the validity of plaintiffs' claims when their complaints were filed, the motion to dismiss does not address whether defendants could have prevailed on the agency inaction claim—whether they would have been justified in not taking any action when the complaints were filed—but instead raise whether the actions they have since taken entirely moot plaintiffs claims. Second, the administrative action and recovery efforts are not subject to judicial review. Armstrong, 924 F.2d at 294.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be granted.

Respectfully submitted this 21st day of January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2009, a true and correct copy of the foregoing Defendants' Motion to Dismiss was served electronically by the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF) and that the document is available on the ECF system.

/s/ Helen H. Hong
HELEN H. HONG