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 No. 1:07cv1707 (HHK) (JMF)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY[1] AND MOTION TO COMPEL RULE 26(f) CONFERENCE

STATEMENT

Through this lawsuit CREW[2] seeks to preserve for history the records of the Bush presidency. The historical importance of a president's records cannot be gainsaid; they offer invaluable insight into the decisions of a president and his administration and remain relevant long after a president leaves office. Books about our earliest presidents continue to be best-sellers and often are based on treasure troves of information mined from their letters and papers.

With a year left in the Bush presidency and great uncertainty about the status of his

[1] On this same date the National Security Archive will also be filing a motion for leave to serve expedited discovery requests in a lawsuit virtually identical to this one, The National Security Archive v. Executive Office of the President, Civil No. 07-1577 (HHK). The discovery that the National Security Archive will seek is identical to the discovery CREW is seeking here. Given the pending unopposed motion to consolidate the two cases, CREW requests that the Court consider the two motions together and grant both CREW and the National Security Archive leave to conduct expedited discovery of the defendants.

[2] CREW is the acronym for plaintiff Citizens for Responsibility and Ethics in Washington.

records, CREW hereby requests leave to conduct expedited targeted discovery while there is still time to take action to prevent further record destruction and ensure that the greatest number of records are preserved. Specifically, CREW seeks to ascertain with more precision the universe of email records deleted from White House servers, the universe of still-existing back-up copies that could be used to restore the deleted records and to obtain documents created by defendant Office of Administration when it discovered the missing emails, which would assist the Court in determining what needs to be preserved on an interim basis. All this discovery has one goal: preserving the records of this presidency for their rightful owner, the American people.

Plaintiff had hoped, through the vehicle of a Rule 26(f) conference, to work with the defendants to, among other requirements of the rule, develop a proposed discovery schedule an discuss further issues related to preserving discoverable information. While this would not have eliminated the need for the expedited discovery requested here, it may have helped narrow the issues for discovery and any discovery disputes. Defendants, however, have refused to meet as Rule 26(f) requires.

BACKGROUND

On September 25, 2007, CREW filed its eight-claim complaint in this action against the Executive Office of the President ("EOP"), the Office of Administration ("OA") and its director, the National Archives and Records Administration ("NARA") and the archivist. The complaint challenges as contrary to law the knowing failure of the defendants to recover, restore and preserve millions of email records created and/or received within the White House and the failure of the archivist and head of OA to take enforcement action to ensure adequate preservation of all federal records. Complaint, ¶ 1. Plaintiff also seeks an order compelling the

defendants to implement an adequate electronic records management system in compliance with federal law. Id. at ¶ 2. This complaint is nearly identical to a complaint filed on September 5, 2007, by the National Security Archive against the same defendants, The National Security Archive v. Executive Office of the President, Civil No. 07-1577 (HKK) (D.D.C.).

The factual background to the complaint includes the OA's discovery in October 2005 that millions of email records covering a two and one-half year period were missing from White House servers where they had been dumped for archival storage, id. at ¶¶ 32-34, a discovery the White House has not denied. After analyzing the problem and determining the extent of the missing emails, the periods of time covered by the missing emails and the Executive Office of the President ("EOP") components from which the missing emails originated, the OA developed a recovery plan that called for restoring the deleted emails from then-existing back-up tapes. Id. at ¶ 36. The White House, however, never implemented this plan or any other; to date, the White House has failed to restore any of the deleted emails. Id. at ¶¶ 36, 39. As a result, the back-up copies created by the White House are the only repository for the deleted emails. Id. at ¶ 41. Those tapes contain both presidential and federal records in a commingled form. Id.

The deleted emails had been stored on White House servers as a substitute for the previous electronic record-keeping system in place, ARMS ("Automated Records Management System"). Complaint, ¶ 32. There were and continue to be no controls in place to protect against anyone with access to the servers altering or destroying the electronic records stored on these servers. Id. Despite the expenditure of significant sums of money and the development of several electronic record-keeping management systems to replace ARMS, the White House has

to date failed to implement an appropriate and effective electronic records management system. Id. at ¶¶ 36-40.

Contemporaneously with filing this lawsuit CREW sent a letter to the OA seeking assurances that all back-up copies of the deleted records would be preserved pending the resolution of this litigation. When the OA's counsel refused to provide those assurances,[3] CREW sought a temporary restraining order ("TRO") to compel the defendants to preserve all back-up copies.

On October 17, 2007, the matter was heard by United States Magistrate Judge John Facciola, who issued a report and recommendation on October 19, 2007, recommending that this Court enter the requested TRO. Judge Facciola concluded that absent this relief, CREW will suffer irreparable harm; as he noted, the threat that back-up media would be destroyed "is a text book example of irreparable harm." Report and Recommendation, October 19, 2007, p. 2. He further found that the public interest favored preservation "since the e-mails at issue may have historical and public importance." Id. Finally, Judge Facciola weighed the irreparable harm to CREW, the absence of harm to the defendants and the "substantiality of the legal questions presented" to conclude that the TRO should be issued. Id. at 4-5. In particular on the merits of the defendants' claim that the OA is not an agency and therefore not subject to the requirements of the Federal Records Act, Judge Facciola found that after reviewing the briefs presented in another case on this issue, "I certainly cannot say that CREW has no likelihood of prevailing on

[3] Among other things, the White House defendants refused to explain what they meant by "disaster recovery tapes," to what extent they included back-up copies stored on other mediums such as CD ROMs and disks, the time-frame covered by the disaster recovery tapes they were agreeing to preserve, and whether or not they had already transferred custody, possession or control of any back-up copies to other non-EOP entities.

that issue." Id. at 4. On October 23, 2007, the defendants filed objections to this report and recommendation.

On October 18, 2007, CREW sent a letter to defendants' counsel requesting that, pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, counsel provide CREW with dates and times on which she is available to confer. Letter to Helen H. Hong from Anne L. Weismann, October 18, 2007 (attached as Exhibit 1). The letter noted that Rule 26(f) directs the parties to confer "as soon as practicable" and suggested any time during the entire week of October 22 through 26 for holding such a conference. Id.

On the evening of October 22, 2007, defendants' counsel sent an email response to this letter which stated in pertinent part: "we are currently considering your request[] and we will be in touch soon." Email from Helen Hong to Anne Weismann, October 22, 2007 (attached as Exhibit 2). The following day CREW sent an email to defendants' counsel requesting, pursuant to Rule 26(f), that counsel advise CREW by close of business October 25 "whether you will be able to meet either this week or next . . " Email from Anne Weismann to Helen Hong, October 23, 2007 (attached as Exhibit 3). Defendants's counsel never responded to this email or otherwise advised CREW of her availability to meet.

ARGUMENT

I. EXPEDITED DISCOVERY IS NECESSARY AND APPROPRIATE TO ENSURE THE GREATEST POSSIBLE PRESERVATION OF THE RECORDS OF THE BUSH PRESIDENCY.

As with any civil litigation, this Court has broad discretion on whether and particularly what discovery CREW should be granted. See, e.g., SafeCard Servs., Inc. v. Securities and Exchange Commission, 926 F.2d 1197, 1200 (D.C. Cir. 1991). That discretion includes the

ability to expedite discovery. Ellsworth Associates, Inc. v. U.S., 917 F.Supp. 841, 844 (D.D.C. 1996). "Expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings." Id. Moreover, where, as here, "one party has an effective monopoly on the relevant information" the need for discovery is especially acute. Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 833 (D.C. Cir. 1979).

While the courts are split as to the standard that a party seeking expedited discovery must satisfy,[4] the courts in this district generally apply a good cause standard. See, e.g., Ellsworth Associates, Inc., 917 F.Supp. at 844. Under that standard, a litigant is entitled to expedited discovery unless the opposing party can show good cause for why discovery should be denied. Id. Moreover, a party's need for timely information constitutes good cause to grant a request for expedited discovery. Whitkop v. Baldwin, 1 F.R.D. 169 (D. Mass. 1939); Optic-Electronic Corp. v. U.S., 683 F.Supp. 269, 271 (D.D.C. 1987).

Here, expedited discovery is warranted under either standard based on the compelling and urgent need to ensure the greatest possible preservation of the records of President Bush. As even the White House admits, at least five million email records generated over at least a two and one-half year period from multiple components of the EOP are missing. The missing electronic records span critical years of the Bush presidency, from the United States' invasion of Iraq to Hurricane Katrina and the administration's formulation of a position on global warming.

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[4] Some courts apply the same standard as that required to obtain a preliminary injunction, see, e.g., Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982), while other courts apply a "reasonableness" or "good cause" standard. See Special Situations Cayman Fund v. Dot Com Entertainment Group, Inc., 2003 U.S. Dist. LEXIS 25083 *5 (W.D.N.Y. 2003).

Plaintiff's request for a TRO was premised on the urgent need to ensure preservation of all back-up copies of the deleted emails pending resolution of this lawsuit because without this assurance, plaintiff and the public risk losing access to this important body of historical documents. As Judge Facciola recognized, if the only remaining copies of these records are not preserved this lawsuit becomes essentially an academic exercise. Transcript of Motions Hearing Before the Honorable John M. Facciola, October 17, 2007, p. 6 (attached as Exhibit 4).

While the preservation order recommended by Judge Facciola protects against the loss of valuable historical records, it leaves unanswered critical questions that cannot be answered without additional factual inquiry. Most fundamentally, the White House defendants have refused to identify anything about the still-existing body of back-up copies, including what time period they cover, the extent to which they contain any of the missing emails and whether there are other copies beyond what the defendants have referred to as "[d]isaster recovery tapes relating to the official, unclassified Executive Office of the President email system."[5] Nor have the White House defendants identified the precise number of deleted emails and the extent to which back-up copies of the deleted emails were destroyed prior to September 2007. This missing information is crucial in determining the extent to which the missing email records can be reconstructed and therefore the extent to which the plaintiff can be afforded full and effective relief.

This information is also very time-sensitive. In just 14 months there will be a new administration and there is no assurance that in the ensuing transition copies of deleted emails

[5] Defendants' Local Rule 72.3(b) Objections to Report and Recommendations on Plaintiff's Motion for a Temporary Restraining Order ("Ds' Objections"), p. 2 n.1.

and other documents necessary or useful to restoration will be preserved.[6] These same concerns led the court in Bush v. Armstrong to enter a TRO at the end of the Reagan administration as well as a TRO at the close of the Bush administration in 1992. See 807 F.Supp. 816, 820 (D.D.C. 1992) ("[I]f records are erased at the end of the Bush Administration, the public's right to access the subject records will be irreparably lost and harmed."). See also Express One Int'l, Inc. v. U.S. Postal Service, 814 F.Supp. 87, 92 (D.D.C. 1992) (recognizing need for quick discovery in light of upcoming transition to new contractor).

Accordingly, it is critical to ascertain what time period is covered by the presently existing back-up copies and, in particular, the "disaster recovery tapes relating to the official, unclassified [EOP] email system." To the extent this particular set of tapes does not encompass all of the missing emails, it is essential that other copies are preserved, whether or not they were created specifically for disaster recovery efforts and whether or not they are currently in the OA's possession, custody or control.

This information may also reveal the extent to which any of the defendants has already destroyed any back-up copies of the deleted email records or transferred them out of the OA's possession, custody or control.[7] Separate and apart from the illegality of any such action, it is

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[6] If defendants have their way, any preservation order will require them to preserve only disaster recovery tapes for the "official, unclassified [EOP] email system" currently in the OA's possession, custody or control, Ds' Objections at pp. 2 n.1, 8, leaving them free to destroy other copies that may exist, including what may be the only remaining copies of deleted emails.

[7] The likelihood that such destruction has already occurred may be inferred from the defendants' opposition to plaintiff's motion for a TRO ("Ds' Oppos."), in which they attach a single exhibit: a November 5, 1995 schedule authorizing the destruction of backup tapes which contain "records that are duplicated elsewhere for preservation and disposition." Ds' Oppos., Exhibit 1, p. 4, ¶ 8. From this the White House defendants argue that the OA "was permitted under the FRA [Federal Records Act] to recycle, or delete, backup tapes 'when 90 days old.'"

critical to ascertain what back-up copies may have been destroyed to determine what additional steps can and should be taken to replicate those copies before the end of President Bush's term in office. These other copies, however, whether in hard drives or other repositories, are only accessible for the duration of President Bush's term, after which they will be cleaned out for the incoming president. Accordingly, it is critical to pinpoint what back-up copies are presently available and what back-up copies have been destroyed to explore, in the short time that remains, alternative methods of restoring the millions of deleted email records.

It is also essential to secure the documentation assembled by the OA when it first discovered the missing email problem in October 2005. This documentation will shed light on the scope of the missing email problem and how it can be redressed. In particular, the recovery plan that the OA developed after it discovered the deleted emails, which called for restoring the deleted emails from then-existing back-up tapes, will confirm what back-up copies must presently be preserved for a successful restoration effort. Given the current dispute between the parties as to precisely what should be preserved to prevent irreparable injury, this document would streamline the court's processes, would limit or eliminate altogether lengthy satellite litigation over threshold preservation issues, and would present no hardship for the White House defendants to produce.

CREW has sought this information under the Freedom of Information Act ("FOIA") and its FOIA request is the subject of a separate lawsuit, CREW v. OA, Civil No. 07-0964 (CKK) (D.D.C.), in which the White House has argued that the OA is not an agency and therefore is not

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Ds' Oppos. at 11.

subject to the FOIA.[8] The status of these documents as agency or non-agency records for purposes of the FOIA, however, does not place them beyond CREW's reach in this litigation, where they are clearly fair game for discovery. As highly relevant evidence of the scope of the email problem and what needs to be preserved to ensure the Court's ability to award plaintiff full and effective relief, these documents should be disclosed at the outset of this litigation.

Finally, documents about the architecture of the email storage system that the EOP used between March 2003 and October 2005, the period during which the millions of emails were deleted, and the email storage system currently in use by the EOP (to the extent, if any that it differs) would be enormously useful in sharpening the focus of this litigation, especially as the Court grapples with what preservation obligations it should impose on the defendants. The White House defendants have made it clear that absent discovery, they will not provide answers to even the most basic questions. See, e.g., Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order, p. 17. Yet basic information about how the email storage system works will go a long way towards assessing what must currently be preserved and why. And, as with the recovery plan developed by the OA, production of these documents will not be a hardship for the defendants.

In sum, the backdrop of this case presents compelling reasons why expedited discovery is warranted. Under this administration's watch, millions of email have gone missing and the White House has done nothing to reconstruct those historically important federal records or take

[8] In arguing that it is not an agency subject to the FOIA, the OA reversed the course it has followed since its inception of holding itself out as an agency and complying with all of the FOIA's requirements, including the promulgation of FOIA regulations (found at 5 C.F.R. Part 2502).

steps to prevent further document destruction. When confronted with requests for information about the missing email problem, the White House has unilaterally removed itself from the public arena altogether by declaring that the OA is no longer an agency subject to government sunshine laws. In the short life of this lawsuit the White House defendants have refused to give adequate assurances of document preservation, refused to provide basic information and refused to meet with plaintiff's counsel to plan for discovery. Most recently, in their objections to Judge Facciola's report and recommendation, the defendants have objected to preserving back-up copies under conditions that will permit their eventual use. Defendants' Objections, p. 7. Clearly the defendants do not share the plaintiff's goal of preserving these documents for future public access. The defendants' conduct coupled with the risk that critical evidence will not be preserved provide ample support for the limited discovery plaintiff seeks to conduct at this juncture.

II. THE COURT SHOULD COMPEL THE DEFENDANTS IMMEDIATELY TO MEET AND CONFER AS RULE 26(f) REQUIRES.

Rule 26(f) of the Federal Rules of Civil Procedure states in clear, unambiguous terms that the parties to a civil lawsuit "must, as soon as practicable" confer on a number of issues, including "the nature and basis of their claims and defenses," to arrange for the initial disclosures that Rule 26(a)(1) requires of the parties, "to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan . . ." The Rule further provides that "[t]he attorneys of record . . . are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan." Fed. R. Civ. P. 26(f)(6).

Courts interpreting this rule have emphasized that "[t] responsibility for arranging this conference and initiating discovery is placed squarely on the shoulders of the attorneys of record and not on the district court." Scott v. Graphic Communications Internat'l Union, 2004 U.S. App. LEXIS 4979 *3 (3d Cir. 2004). Moreover, "[w]hile Rule 26(f) does not state with precision when such a conference between the parties must occur, it does provide that it should take place 'as soon as practicable' . . ." OMG Fidelity, Inc. v. Sirius Technologies, Inc., 239 F.R.D. 300, 303 (N.D.N.Y. 2006).

Pursuant to this mandatory obligation, CREW has attempted more than once to arrange for a conference, proposing complete availability within a two-week window of time. To date, however, defendants' counsel has refused to respond substantively to this request, refused to identify her availability to meet and refused to provide alternative dates. This conduct is a complete abrogation of the responsibilities that defendants' counsel shares with plaintiff's counsel under Rule 26(f).

It may be that defendants are attempting to avoid discovery, given the prohibition in Rule 26(d) on conducting discovery prior to the Rule 26(f) conference, absent agreement of the parties or court order. This, of course, would be highly improper, particularly given that one of the purposes that the Rule 26(f) conference is intended to serve is to identify the parties' positions on discovery.

Under these circumstances and particularly in view of the pressing need for discovery and the time-sensitive nature of this lawsuit, as discussed herein, defendants should be ordered to meet and confer immediately with plaintiff pursuant to Rule 26(f), whether or not the Court also grants plaintiff leave to conduct expedited discovery.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that its motion for expedited discovery be granted. Plaintiff further requests that defendants be ordered to immediately meet with plaintiff pursuant to Rule 26(f) of the Federal Rules of Civil Procedure.

Respectfully submitted,

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