UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL SECURITY ARCHIVE, Plaintiff, v. EXECUTIVE OFFICE OF THE PRESIDENT, et al., Defendants.	)	Civ. No. 07-1577 (HHK)

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

BACKGROUND

This lawsuit seeks to save important historical records of the United States. The records at issue are not being preserved as required by the Federal Records Act and are in danger of being lost forever. According to at least two news media reports in April 2007, several million email messages sent from and received within the Executive Office of the President ("EOP") over at least a two-year period have been deleted from White House servers administered by the White House Office of Administration.

The National Security Archive (the "Archive") is no stranger to such controversies as it was one of the plaintiffs in *Armstrong v. EOP*, 810 F. Supp. 335

[1] The Archive understands that on this same date Citizens for Responsibility and Ethics in Washington (CREW) has also filed a motion to compel a Rule 26(f) conference and for leave to conduct expedited discovery in a lawsuit virtually identical to this one. *Citizens for Responsibility and Ethics in Washington v. Executive Office of the President, et al*., Civil No. 07-1577 (HHK) ("*CREW v. EOP*"). The discovery that CREW seeks is identical to the discovery the National Security Archive is seeking here. Given the pending unopposed motion to consolidate *CREW v. EOP* with this case, the Archive requests that the Court consider the two motions together and grant both the National Security Archive's and CREW's motion.

(D.D.C. 1993), which led to the issuance of a series of court orders that required the preservation and recovery of millions of email records from the Reagan, Bush and Clinton White Houses. In the *Armstrong* series of cases, the federal courts in the District of Columbia recognized the pressing need to preserve the emails in question while the legal issues in the case were being resolved. Despite settled legal obligations flowing from Federal Records Act and the *Armstrong* cases requiring that federal record emails be preserved, the Executive Office of the President is not preserving such records.

The White House acknowledged in two April 2007 press conferences that as many as 5 million emails may be missing.[2] With just over a year left in the current administration, and a great deal of uncertainty as to the status of the millions of missing email records within the EOP, the Archive requires expedited commencement of discovery while there is still time to take action to ensure that the greatest number of federal records are preserved.

On September 5, 2007, the Archive filed this case seeking injunctive relief against the Executive Office of the President (EOP), the Office of Administration, Executive Office of the President (OA), Alan Swendiman, the Head of the Office of Administration, Executive Office of the President, the Archivist of the United States, and the National Archives and Records Administration (NARA). The suit includes eight counts related to the improper deletion of federal records within the Executive Office of the President. The complaint alleges illegal conduct due to the knowing failure of the defendants to

[2] Press Release, White House Office of the Press Secretary, Press Gaggle by Dana Perino and Dr. Ali Al-Dabbagh, Spokesman for the Government of Iraq (April 13, 2007) (White House spokesperson quoted as saying, "I wouldn't rule out that there were a potential 5 million emails lost"); Press Release, White House Office of the Press Secretary, Press Briefing by Dana Perino (April 16, 2007) (White House spokesperson quoted as saying, "we are aware that there could have been some emails that were not automatically archived because of a technical issue").

recover, restore and preserve millions of email records created and/or received within the Executive Office of the President 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.

On September 25, 2007, Citizens for Responsibility and Ethics in Washington (CREW) filed a virtually identical complaint in *Citizens for Responsibility and Ethics in Washington v. Executive Office of the President, et al.,* Civil No. 07-1707 (HHK/JMF) ("*CREW v. EOP*") against the same defendants and designated it as related to this case. On October 11, 2007, CREW filed a motion for a temporary restraining order against the White House defendants seeking an order requiring preservation of all the records that are the subject of their suit. A hearing on that motion was held before Magistrate Judge Facciola on October 17, 2007. Magistrate Judge Facciola issued a report on October 19, 2007, which recommended that the Court grant a temporary restraining order against defendants requiring them to preserve existing back-ups in any medium that are in the possession, custody or control of any of the defendants. (Exhibit 1) 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." *CREW v. EOP,* Report and Recommendation, October 19, 2007, at 2. He further found that the public interest favored preservation "since the emails 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: "I certainly cannot say that CREW has no likelihood of prevailing on that issue." *Id*. at 4.

On October 18, 2007, after first requesting adequate assurances of document preservation from the government and in light of the government's statements at the October 17, 2007 hearing in *CREW v. EOP*, the Archive requested a meeting with the defendants to discuss discovery pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. Letter from Sheila L. Shadmand to Helen H. Hong dated October 18, 2007 (Exhibit 2). Although the defendants have not formally appeared yet in this lawsuit, counsel for the defendants has identified herself to the Archive. (Exhibit 5) Further, although this lawsuit was filed first, it is virtually identical to the suit filed by CREW three weeks later. Accordingly the government's filings and representations in *CREW v. EOP* have significance to the plaintiff in this case as well.

CREW also sent a letter on October 18, 2007, requesting a meeting pursuant to Rule 26(f). Letter from Anne L. Weissman to Helen H. Hong dated October 18, 2007 (Exhibit 3). Both the Archive and CREW requested that the discovery conference take place "as soon as practicable" as mandated by Rule 26(f). Both the Archive and CREW expressed a willingness to meet at any time during the week of October 22, 2007. In light of the short time remaining for the current White House administration, and the irreparable harm that will occur to plaintiff – indeed to the entire American public – if the passage of time permits the deletion of additional email records, the Archive had hoped to develop a plan to promptly commence discovery in conjunction with the defendants. Counsel for the defendant sent an email response to the Archive on Monday October 22,

2007, stating that it would consider the request during the week of October 22, 2007. E-mail from Helen H. Hong to Meredith Fuchs dated October 22, 2007 (Exhibit 4). Counsel for the Archive again contacted counsel for the defendant by telephone voicemail message on Friday, October 26, 2007 seeking a response to the request for a Rule 26(f) conference. The defendants have not responded to the Archive's request for their views on this motion or request to schedule a Rule 26(f) conference. Thus, the Archive is forced to bring this motion to request an order from the Court compelling the parties to meet pursuant to Rule 26(f) as soon as possible or to order expedited discovery seeking critical information about the email records deleted from the Executive Office of the President's servers and the existing back-ups from which those emails can be restored.

ARGUMENT

As with any civil litigation, the Court has broad discretion as to whether and what discovery the Archive should be granted. *See, e.g., SafeCard Servs., Inc. v. Securities and Exchange Commission*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Rule 26(d) authorizes the Court, in its sound discretion, to order expedited discovery for good cause. *See* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2046.1; *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996).

While the courts apply varying standards to guide them in the exercise of this discretion,[3] the facts in this case demonstrate that there is good cause for the

[3] 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).

commencement of discovery, there is a great risk of irreparable harm if the commencement of discovery is delayed, and the discovery will serve to expedite resolution of plaintiff's injunctive claims on a matter of national importance. *See, e.g., Ellsworth Associates, Inc*., 917 F. Supp. at 844 (granting expedited discovery where the discovery would expedite resolution of plaintiff's injunctive claims and the defendants failed to establish "good cause" for a protective order). A party's need for timely information constitutes good cause for such expedited discovery. *See Optic-Electronic Corp. v. United States*, 683 F. Supp. 269, 271 (D.D.C. 1987) (granting motion for expedited discovery where "[i]t is in the best interest of all parties to have this case resolved as soon as possible"); *Whitkop v. Baldwin*, 1 F.R.D. 169 (D. Mass. 1939). 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).

In this case, time is a critical factor in protecting extremely important federal records that are—by the White House's own admission—missing. The records at issue include over 5 million email records generated between 2003 and 2005 (and possibly later) in the Executive Office of the President. The EOP includes among its agency components: the Office of Administration (OA), the Office of Management and Budget (OMB), the United States Trade Representative (USTR), the Office of National Drug Control Policy (ONDCP), the Council on Environmental Quality (CEQ), and the Office of Science and Technology Policy (OSTP). These agencies have long been recognized as subject to the Federal Records Act and records disclosure laws such as the Freedom of Information Act.

The missing records at issue span critical events in U.S. policy, including the invasion of Iraq in March 2003, the Abu Ghraib scandal, release of a congressional report detailing the flawed intelligence that was relied upon concerning weapons of mass destruction in Iraq, and the handling of Hurricane Katrina. If the deletions go beyond 2005, they may also involve records concerning the renewal of the highly controversial U.S.A. Patriot Act, a major administration initiative concerning immigration policy, and the White House role in the firing of a number of U.S. Attorneys. These are the kinds of records that the Federal Records Act seeks to preserve because they document our history and facilitate an informed American public.

The White House has acknowledged the deletion of the records but has not detailed the scope of the deletions, the number of missing emails or the time period during which emails have been deleted. *See supra* note 1.

Critically, this Administration is entering its last 14 months. On January 20, 2009, a new President will enter the White House and an entirely new staff will take over the computers that received and transmitted the emails at issue. At that time, any effort to recover missing email records will be significantly compromised.

Although this court may enter an order pursuant to Magistrate Judge Facciola's recommendation that would bar defendants from destroying any of the existing back-ups in their possession, custody or control, there remains a pressing need for the immediate commencement of discovery. In order to ensure that plaintiffs' rights to ultimate relief will be preserved, questions regarding what back-ups of EOP emails still exist and how their preservation is ensured must be answered.

Most fundamentally, the defendants refuse to provide any details 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 multiple copies beyond what the defendants have variously referred to as "disaster recovery tapes – tapes formatted to focus on restoring systems and point in time data in the event of an emergency – that were in the Office of Administration's possession as of September 5, 2007," Letter of Helen H. Hong to Sheila L. Shadmand dated October 8, 2007 (Exhibit 5) and "[d]isaster recovery tapes relating to the official, unclassified Executive Office of the President email system."[4] Defendants' papers in *CREW v. EOP* do not explain what the coverage of the "official, unclassified" system is. Nor is it clear whether the various back-ups referred to concern email records currently on the system or back-ups of file server files in which the emails were stored after being extracted from the email system. There is significant confusion on these issues because, although the defendants have made representations about back-ups held by OA, counsel for the defendants stated at the October 17, 2007 hearing before Magistrate Judge Facciola in *CREW v. EOP*, "[T]here are additional back-up tapes in addition to the ones that were in the Office of Administration's possession on September 25th." Statement of Helen H. Hong, Counsel for Defendants, Transcript of Hearing in *CREW v. EOP* on October 17, 2007, Page 5, Lines 15-17 (Exhibit 7). Resolving these ambiguities is crucial in determining the extent to which additional steps must be taken immediately to protect plaintiff's right to full and effective relief.

[4] *CREW v. EOP*, Defendants' Local Rule 72.3(b) Objections to Report and Recommendations on Plaintiff's Motion for a Temporary Restraining Order, p. 2 n. 1 (Exhibit 6).

Plaintiffs also seek to discover whether deleted emails are missing from the existing back-up media. The likelihood that such destruction has already occurred may be inferred from the defendants' opposition to CREW's motion for a TRO in which they attach a single exhibit: a November 5, 1995 schedule authorizing the destruction of back-up tapes which contain "records that are duplicated elsewhere for preservation and disposition." *CREW v. EOP*, Defendants' Opposition to CREW's Motion for a Temporary Restraining Order., Exhibit 1, p. 4, ¶ 8. (Exhibit 8.) From this, the White House defendants argue that the OA "was permitted under the FRA [Federal Records Act] to recycle, or delete, back-up tapes 'when 90 days old.'" *CREW v. EOP*, Defendants' Opposition to CREW's Motion for a Temporary Restraining Order at 11. (Exhibit 9). Further, at the hearing before Magistrate Judge Facciola in *CREW v. EOP*, although Ms. Hong repeated three times that the back-up tapes for emails generated by EOP components after September 25, 2007, are not being recycled, *this* lawsuit was filed on September 5, 2007. Statement of Helen H. Hong, Counsel for Defendants, Transcript of Hearing in *CREW v. EOP* on October 17, 2007, Page 5, Lines 18-22, Page 6, Lines 10-11, Page 7, Lines 9-13. (Exhibit 7). Thus, Ms. Hong's representations raise serious concerns with the National Security Archive.

If back-ups were deleted prior to September 5, 2007, when this case was filed, or records were not preserved properly on back-ups from 2003-2005, then an order requiring preservation of the back-ups presently in the defendants hands will not be sufficient to provide the ultimate relief that is sought. It may be necessary, instead, to recover the missing records from other sources, including individual workstations, or through other forensic means. Expedited discovery should quickly establish what back-

ups have been destroyed and what records are missing so that plaintiffs can (1) take steps to protect other sources of missing federal records and (2) focus their claims on what actually can be recovered so as not to enmesh the Court in deciding unnecessary issues. Thus, 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] system"

To wait several months before beginning to discover the answers to the questions raised by plaintiffs would virtually guarantee that the answers will no longer be readily available. A transition in the White House is a major event. The administration wraps up its activities, virtually all of the people involved in policy depart, and the hardware and software systems are cleared.[5] Even if the Court, at that time, were to issue a preservation order that included all of the individual work stations, servers, and associated technology once the systems are no longer live operating systems, it may be far more difficult to recover the emails, thus making it less likely the plaintiffs could obtain complete relief. The ability to reconstruct missing emails many months from now will be severely compromised. 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.

---

[5] *See, e.g.*, Stephen Labaton, "Judge Sees Plan by White House to Defy Orders and Purge Data," The New York Times at A1 (Jan. 15, 1993) (describing the reaction of United States District Judge Richey in the *Armstrong* litigation to documents of the outgoing Bush Administration indicating the intent to "write over user data at each work station on all personal computer systems in order to create clean user space for the incoming Administration N.S.C. staff."); Andrew Miga, "Clinton team trying to get up to speed; Phones, traffic still tied up – and the media are complaining already," Boston Globe at 6 (Feb. 1, 1993) (describing transition from Bush Administration to Clinton Administration); Sonya Ross (AP), "Confusion, last minute touch ups welcome new Washington regime," (Jan. 22, 2001) (Describing transition from Clinton Administration to Bush Administration).

In addition, 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 would be enormously useful in sharpening the focus of this litigation, especially as the Court grapples with questions about what preservation obligations it should impose on the defendants. The defendants have made it clear that absent discovery, they will not provide answers to even the most basic questions. *See*, *e.g.*, *CREW v. EOP*, 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 understanding what must currently be preserved and why.

In this case, the relevant factors weigh in favor of expedited discovery regardless of whether the Court grants a temporary restraining order to CREW in *CREW v. EOP*. Expedited discovery is appropriate where, as here, delay may result in irreparable harm, and the discovery may preserve a state of affairs in which the Court may provide effective, final relief. *See, e.g., Express One Int'l, Inc. v. U.S. Postal Service*, 814 F. Supp. 87, 92 (D.D.C. 1992) (enjoining contract and granting expedited discovery in order to expedite resolution of the case so as to avoid harm to parties and greater costs of enjoining contract at a later date after the transition to a new contract).

The Archive is suffering irreparable harm from the deletion of Executive Office of the President emails that constitute federal records, but the full extent of the irreparable harm is presently unknown. Accordingly, the Archive needs to discover which emails have been preserved and which emails are missing to ensure measures are taken to

preserve all the records subject to this suit.[6] In short, given the limited time available, the complex issues to be presented by the Court, and the severity of the impact of the records being lost forever, this Court should order discovery to commence immediately. The Archive is entitled to learn details about what records may exist for future restoration without waiting for the traditional discovery mileposts.

Expedited discovery is also appropriate to "better enable the court to 'judge the parties' interests and respective chances for success on the merits." *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn.) (granting expedited discovery), *aff'd in part and rev'd in part on other grounds*, 746 F.2d 429 (8th Cir. 1984). Here, that includes the possibility of narrowing or focusing the issues in dispute. Plaintiff's lawsuit arises under the Federal Records Act and the judicially enforceable obligations that statute imposes on the defendants. This Court clearly has jurisdiction to enforce the obligations that the Federal Records Act imposes on the defendants with respect to the federal records included among the deleted emails. *See, e.g., Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991). While it is possible that the defendants may argue that some of their components are not subject to the Federal Records Act, because all of the records of the EOP are commingled, it is irrelevant whether one of the components is or is not subject to the Federal Records Act.[7] Therefore, granting expedited discovery

---

[6] Thus, this case differs from the circumstances in a case such as *Armstrong v. Bush*, 807 F. Supp. 816 (D.D.C. 1992), where forward-looking preliminary relief was ordered while the legal issues were resolved. Here, in contrast, the potential disappearance or destruction of emails is not tied to a definite event *in the future*, but instead to a course of conduct that took place in the past and may be continuing.

[7] The White House has argued in an unrelated suit, despite the fact that the OA has long processed FOIA requests and been identified as subject to FOIA by the White House, that the OA is not an "agency" subject to the FOIA. *Citizens for Responsibility and Ethics in Washington v. White House Office of Administration*, Civil No. 07-0964 (CKK) (D.D.C.). It has signaled in its opposition papers to CREW's motion for a temporary restraining order in *CREW v. EOP* that it intends to make a similar argument here that OA is not subject to the Federal Records Act. The Court need not concern itself with this argument in

will help focus the location of the missing federal record e-mails and thus serve to move the lawsuit forward in the most tailored way.

The backdrop of this case presents compelling reasons why expedited commencement of discovery is warranted. Under the current administration, millions of email have gone missing and the White House has done nothing to restore and archive those historically important federal records or take steps to prevent further historical records destruction. When confronted with requests for information about the missing email problem, the White House has refused to give adequate assurances of preservation, refused to enter into any judicially monitored agreement concerning preservation, and refused to even meet with plaintiff's counsel to plan for discovery. The defendants' conduct – coupled with the risk that critical information about significant events in U.S. policy will not be preserved – provide ample support for the commencement of discovery at this juncture.

Finally, the Court should compel the parties to meet as soon as possible to meet and confer pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. Under Rule 26(f), the parties to a civil lawsuit "must, as soon as practicable" confer on a number of matters, including "the nature and basis of their claims and defenses," to arrange for the initial disclosures, "to discuss any issues relating to preserving discoverable information," and "to develop a proposed discovery plan …." In light of the serious concerns raised by the government's statements and submissions in *CREW v. EOP*, which was filed after this case but is virtually identical to this case, the Archive has attempted to set up such a

---

relation to this motion for expedited discovery because, regardless of the outcome of that legal issue, there are many other agency components of the EOP that are subject to the Federal Records Act and that rely on the OA to manage, maintain, and back-up their email systems. The EOP cannot avoid these obligations by shifting records to a non-agency entity. Accordingly, there is no serious argument that plaintiff does not have a likelihood of success on the merits.

conference. Counsel for the government acknowledged the Archive's request but has not responded to the request. In light of the pressing need for discovery and the time-sensitive nature of this lawsuit, as discussed above, the Court should order the parties to engage in a Rule 26(f) conference as soon as possible.

CONCLUSION

For these reasons, the Court should grant plaintiff's motion for expedited discovery and order the parties to meet pursuant to Rule 26(f) as soon as possible. A proposed order is attached.

Respectfully submitted,

DATED: October 26, 2007

_____
JOHN B. WILLIAMS (D.C. Bar No. 257667)
SHEILA L. SHADMAND (D.C. Bar No. 465842)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
202.879.3939

MEREDITH FUCHS (D.C. Bar No. 450325)
THE NATIONAL SECURITY ARCHIVE
The Gelman Library
2130 H Street, N.W., Suite 701
Washington, D.C., 20037
202.994.7059
Attorneys for Plaintiff The National Security Archive

CERTIFICATE OF SERVICE

I hereby Certify that on October 26, 2007, one copy of the Plaintiff's Motion for Leave to Serve Expedited Discovery Requests and to Compel Rule 26(f) Conference, the memorandum in support thereof, and proposed order of the National Security Archive filed on this day was served by United States Mail and electronic mail on the attorney listed below who has identified herself in correspondence as the attorney for the government defendants in this action:

Helen H. Hong
Trial Attorney
U.S. Department of Justice, Civil Division
P.O. Box. 883
Washington, DC 20044

_____
Meredith Fuchs